83-2001

No.

In the Supreme Court of the United States

October Term, 1983

GWELDON LEE PASCHALL AND INTERVENORS,
Petitioners,

vs.

THE KANSAS CITY STAR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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190 pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the majority of the sharply divided *en banc* Court of Appeals err in establishing under Section 2 of the Sherman Act an unprecedented presumption of legality for a metropolitan newspaper monopolist which had attained monopoly power in the publishing market unlawfully and which sought to use that power to destroy all competition in a second, vertically related retail market through a refusal to sell its product at wholesale and, thereby, extend its monopoly with substantial anticompetitive effects?

II. Did the majority of the sharply divided *en banc* Court of Appeals violate its appellate function by basing its unprecedented presumption of legality for a vertically integrating monopolist on an abstract economic theory that was not presented by defendant-respondent at trial, that was not tested in the detailed factual circumstances of this live controversy and that was, in fact, contradicted by uncontroverted evidence in the record?

PARTIES TO THE PROCEEDINGS

The names of all 271 petitioners (all plaintiffs in the District Court) are set out in the appendix (Pet. App. A139-A154). The sole defendant-respondent is The Kansas City Star Company (hereinafter "Star Company").

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Gweldon Lee Paschall, et al., Petitioners, respectfully pray that a Writ of Certiorari issue to review the *en banc* opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 6, 1984, which reversed a decision of the United States District Court for the Western District of Missouri imposing injunctive relief under Section 16 of the Clayton Act to prevent Section 2 violations of the Sherman Act.

OPINIONS BELOW

The opinion and dissents of the Court of Appeals, sitting *en banc,* is not yet reported (Pet. App. A1-A29). The opinion and dissent of the Court of the Appeals, sitting in division and decided December 20, 1982, is reported at 695 F.2d 322 (8th Cir. 1982) (Pet. App. A30-A72). The opinions of the District Court on the issues

before this Court are unreported (Pet. App. A78-A84 and A89-A102). The opinion of the Court of Appeals remanding this action for further proceedings after respondent sought an appeal prematurely is reported at 605 F.2d 403 (8th Cir. 1979). The District Court memorandum refusing to amend its original decision from which respondent first appealed is unreported (Pet. App. A85-A88). The District Court memorandum and order granting a preliminary injunction is reported at 441 F.Supp. 349 (W.D.Mo. 1977) (Pet. App. A103-A135).

JURISDICTION

The judgment of the Court of Appeals, sitting *en banc*, was entered on February 6, 1984 (Pet. App. A1-A29). On March 21, 1984, an order was entered that the issuance of the mandate herein be stayed until June 19, 1984, or, if a petition for a writ of certiorari is filed until final disposition of the case by this Court (Pet. App. A136). Justice Blackmun granted petitioners' motion on May 1, 1984, to extend the time for filing this petition until June 5, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves Section 2 of the Sherman Act and Section 16 of the Clayton Act, 15 U.S.C. Sections 2 and 26. These statutes are reprinted in pertinent part in the Petitioners' Appendix A137-A138.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The jurisdiction of the trial court, the United States District Court for the Western District of Missouri, is based upon 15 U.S.C. Sections 4 and 26, which invest the several District Courts of the United States with jurisdiction to prevent and restrain violations of 15 U.S.C. 2.

STATEMENT OF THE CASE

This case presents in sharp focus "one of the most unsettled and vexatious legal issues of antitrust law today" —under what circumstances may a monopoly firm extend its monopoly into a vertically related second market. *Byars v. Bluff City News Co.*, 609 F.2d 843, 846 (6th Cir. (1979). At issue is the application of this Court's holdings in: *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States v. Griffith*, 334 U.S. 100 (1948); and *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); prohibiting a monopolist from extending his monopoly as well as the admonition that a unilateral refusal to deal may not be used to create a monopoly. *United States v. Colgate Co.*, 250 U.S. 300 at 307 (1919).

Respondent, the United States and petitioners agree that this case presents an issue of "extraordinary public importance"[1] and "involves an important question of antitrust law which has not been authoritatively resolved by the Supreme Court."[2]

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1. Petition for Rehearing *En Banc*, p. 2.

2. Motion of United States as *Amicus Curiae* for leave to file an enlarged brief on appeal in this action.

The essential facts herein are not in dispute.[3]

(1) **Monopoly Power in the Publishing Market.** Respondent Kansas City Star Company, which was formed in 1880, publishes the only metropolitan daily newspapers of general circulation in the Kansas City area. Its "road to dominance in the Kansas City market, however, was marred by a conviction for attempted and actual monopolization in violation of Section 2 of the Sherman Act" (Pet. App. A2), due to predatory practices in driving competitors out of the market and preventing other papers from entering the market. See *Kansas City Star v. United States,* 240 F.2d 643 (8th Cir.), *cert. denied,* 354 U.S. 923 (1957). It is undisputed that respondent Star Company has had monopoly power since 1942 in the relevant product and geographic market for newspaper publishing—the Kansas City Standard Metropolitan Statistical Area ["SMSA"]. Pet. App. A5.

The monopoly enjoyed by the Star Company is confined to the publication of metropolitan daily newspapers in general circulation in the relevant geographic market. *The monopoly does not extend to retail sales of newspapers* which was established by the evidence as a distinct, separate market.[4]

(2) **Retail Market: History.** This case arises out of respondent's attempt, in 1977, to monopolize the retail sales market for newspapers. For almost 100 years, the Star Company's newspapers had been sold at

3. *Factual Findings of the Trial Court are Not Disputed—* "The defendant seeks an amendment of the memorandum of decision, urging a revision of a legal conclusion, but not of the factual findings." (Pet. App. A85).

4. A series of newspaper cases cited by respondent to permit unilateral changes in the delivery process were found to be inapposite by the district court (Pet. App. A98-A99).

retail by independent contract carriers who bought the newspapers at wholesale from respondent and then resold them to the public at varying retail prices. Each independent retailer had a contract with the Star Company which confined him to sell the company's newspapers along established routes. Due to varying editions of the newspapers and due to varying urban and rural areas within the Kansas City SMSA, the independent retailers offered a variety of delivery services and prices depending on customer preferences and route characteristics.

In February, 1977, Capital Cities Communications, Inc. ("Capital Cities"), a New York-based communications conglomerate, acquired control of respondent. Within six months, Capital Cities announced that the Star Company would terminate the contracts of all independent retailers and replace them with the Star Company's own delivery agents. It also announced that, once the delivery agent system was in place, the Star Company would not sell its newspapers at wholesale to anyone. Pet. App. A32.

In response to this announcement, plaintiff-petitioner Gweldon Paschall, along with other independent retailers (who now total 270), obtained a preliminary injunction against defendant-respondent Star Company, barring it from refusing to sell product to petitioners. Pet. App. A33. After a non-jury trial on the merits, the District Court found that respondent's vertical integration into the retail sales market, coupled with its absolute refusal to deal with the independent retailers, would violate Section 2 of the Sherman Act, 15 U.S.C. §2, because it would permit the Star Company to extend its monopoly in newspaper publishing into the retail newspaper market. Pet. App. A86, A89. The District Court thus permanently

enjoined respondent from refusing to deal with the independent retailers or from dealing with them in a discriminatory or predatory manner. It did not, however, bar respondent from seeking to integrate vertically into the retail sales market. Pet. App. A73-77.

The original appellate panel upheld the District Court's findings and the injunction. The panel rejected the contention initially raised on appeal of the Star Company and the Department of Justice that "as a matter of law the company's refusal to deal is not unlawful because economic theory shows that it will produce procompetitive rather than anticompetitive results." (Pet. App. A37). The panel held that a refusal to deal intended to accomplish vertical integration without more is not a Sherman Act violation, but that "extent of permissible vertical integration must be governed by the facts and circumstances of each individual case." (Pet. App. A36).

(3) **Retail Market: Anticompetitive Effects.** Once monopoly power is demonstrated, the second element of Section 2 monopolization—the purpose or intent to exercise that power for anticompetitive or exclusionary purposes—is established upon proof of either (a) specific intent to monopolize or (b) anticompetitive effects that result from the monopolist's action. Pet. App. A5-A6. In holding for plaintiffs-petitioners, both the District Court and the panel majority reviewed the extensive evidence on the anticompetitive effects of respondent's refusal to deal with the independent retailers. The uncontroverted evidence introduced at trial established three, related anticompetitive effects.

First, respondent Star Company's absolute refusal to deal with petitioners eliminated competition in the retail market. In its contracts with petitioners-retailers, the Star Company had reserved the right to sell directly to

subscribers who did not feel that the independent retailers were providing adequate service at reasonable prices. In fact, in 1970, the Star Company did provide direct delivery to a group of subscribers to bring a retailer into line.[5]

Thus, the panel majority found that:

> "There can be no doubt on this record that the independent carriers were acutely aware of the Star's presence on the edge of the market, and that they made their pricing and service decisions accordingly. The Star's proposal to directly deliver its newspapers and to eliminate independent carriers *would destroy the competitive influence it exerts as a potential entrant into the retail market.*" Pet. App. A41-A42. [Emphasis supplied.]

Second, many subscribers have faced, or would face, higher prices from imposition of the Star Company's retail sales prices. There was uncontroverted evidence at trial that, if the Star Company's new retail sales system was imposed throughout the SMSA, then 92 percent of the subscribers would pay more for their newspapers and 8 percent would pay less. Pet. App. A25, A42.

Third, the Star Company's efforts to eliminate independent retailers would also result in decreased consumer services. To satisfy the many differing demands of customers in different areas of the Kansas City SMSA, the independent retailers offer differing split subscriptions (for various editions of the Star's newspapers), various billing and credit arrangements, and various arrangements for street vendors and commercial establishments. The Star

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5. When one of the independent distributors attempted to increase the retail price for newspaper subscribers on its route, the subscribers complained to the Star Company, prompting the publisher to take over the route, delivering the papers itself at the old price. Pet. App. A12-A13.

Company's direct retail sales plan would severely curtail these variations which were based on differing consumer demands in the various retail submarkets for newspaper sales. Pet. App. A19, A22, A25, A43-44. Moreover, the Star Company had already reduced services before the injunction. For example, while the independent retailers had generally delivered papers on "country" routes twice a day, the Star Company's agents will only deliver once a day for those less densely populated routes, Pet. App. A44, thus sharply reducing service to "rural" subscribers in the SMSA. Accordingly, respondent's challenged actions sharply reduced consumer options.

In addition, there was no record evidence that any procompetitive effects would result from the elimination of the independent retailers. As the Court of Appeals stated:

> "the record is devoid of any evidence indicating that the Star can deliver its newspapers more efficiently than the independent carriers. In fact, the *evidence indicates that the Star intends to increase its profits by increasing retail prices* and eliminating the independent carriers' profits *rather than by reducing delivery costs or increasing circulation through lower prices and/or better services."* Pet. App. A44-A45 [Emphasis supplied.]

The panel majority concluded:

> "The record here establishes that the Star's proposed action will destroy the present independently owned distributorships, and eliminate any actual and potential competition in the Kansas City retail newspaper market. Moreover, the evidence . . . shows that the Star's proposed refusal to deal will produce anticompetitive effects on retail prices and services without

accomplishing any savings in market transaction costs or creating production economies." Pet. App. A48.

(4) **The En Banc Majority.** A sharply divided *en banc* Court of Appeals ("*en banc* majority") reversed the panel decision. Pet. App. A1-A29. In so doing, the *en banc* majority relied on an economic theory which defendant-respondent had *not* advanced at trial. According to the *en banc* majority, this "optimum monopoly price" theory holds that there is a single price at which a monopolist can maximize its profits:

> "If the monopolist charges more than this price, its profits will decline because the lost revenues from the reduced number of sales would more than offset the added revenue from the higher price. If the monopolist charges less, the added revenue from increased sales will not compensate for the reduced revenue per sale and the added marginal costs in producing that quantity. Thus, the monopolist's profits will be less than the optimum monopoly price . . . .
>
> "If the demand for the product is at all elastic, forward vertical integration *may* have substantial pro-competitive effects in the form of lower prices and more efficient use of resources." Pet. App. A16-A17. [Emphasis supplied.]

The *en banc* majority acknowledged that petitioners had demonstrated anticompetitive effects at trial:

> "We recognize that on the facts of this case, elimination of the Star Co. as a potential competitor will result in the elimination of some pro-competitive effects in the retail market. Under the contract carrier system, two competitors existed in the distribution or retail market—one actual (the contract carrier serving the route) and one potential (Star Co.). Implementa-

tion of the delivery agent system would leave only one 'competitor' in the market—Star Co. *Thus, the retail market has lost the beneficial interaction between business entities that the antitrust laws were enacted to preserve* . . .

"We are [also] not unaware of certain record evidence of two possible anticompetitive effects of the [Star Company's proposed] delivery agent system: increased prices and reduced services. There is testimony which tends to show *that Star Co. believed at the time of trial that it could not deliver papers more efficiently than the contract carriers and that any additional profits would have to come from increased revenues.*" Pet. App. A18-A19. [Emphasis supplied.]

Moreover, the *en banc* majority did not cite to *any* evidence of procompetitive effects in the record. Nor did it attempt to rebut the panel majority's conclusion that such supposed effects were, in fact, contradicted by record evidence. The *en banc* majority instead relied solely on an academic economic theory and its own unfounded speculation to posit such procompetitive effects. Pet. App. A22.

The *en banc* majority thus used the "optimum monopoly price" theory to establish a novel presumption of legality for a monopolist to vertically extend its monopoly. Despite its refusal to cite to, much less to analyze, the evidence introduced at trial, the key holding of the *en banc* majority's opinion was that "appellees [petitioners] have not borne their *burden as plaintiffs of proving that the procompetitive effects generated by optimum monopoly pricing* and the unique nature of a newspaper's revenues are outweighed by the minimal anticompetitive effect of eliminating potential competition from the retail market."

Pet. App. A22 (emphasis supplied). In other words, despite the *en banc* majority's concession of proven anticompetitive effects, it held that such uncontroverted proof did not outweigh the posited procompetitive effects of the "optimum monopoly price" theory which thus created a presumption of legality.

This holding is in stark contrast to the panel majority's conclusion reached under traditional rule of reason balancing that the "economic theory advanced by the Star and *amicus*, standing alone without factual support in the record, is insufficient to rebut . . . [the] evidence [of anticompetitive effects]." Pet. App. A48. The holding of the *en banc* majority is also bizarre because defendant-respondent at trial did not present an expert economic witness, much less introduce the "optimum monopoly price" theory. Pet. App. A39. Petitioners thus had no opportunity to introduce additional evidence that would have allowed them to carry their "burden", by rebutting the novel presumption of legality for a vertical extension of a monopoly.

REASONS FOR GRANTING THE WRIT

The Congressional purpose in creating Section 2 of the Sherman Act was to curtail the concentration of economic power by monopoly.[6] Further, this Court has interpreted Section 2 to achieve the Congressional intent through preservation of competition and prevention of monopoly. As a corollary, this Court has consistently held that monopoly power, once attained, could not be used in another market (*United States v. Griffith, supra*) or to create a monopoly by refusing to deal (*United States v. Colgate Co., supra*).

The *en banc* majority decision ignores and dramatically transforms legal standards requiring a detailed factual examination under a rule of reason analysis. The Eighth Circuit created an unprecedented antitrust presumption of legality to evaluate a monopolist's extension of its monopoly into a new downstream market through a refusal to deal.

The decision by the *en banc* majority has four crucial flaws. First, the decision manipulates, distorts, or ignores cases from this Court and lower courts which consistently hold that a monopolist may not lawfully extend its monopoly from one market to another by refusal to deal. Second, it does so by creating a presumption of legality for such action on the basis of purely deductive economic theory—theory produced by the so-called "Chicago School" of

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6. In passing the Sherman Act, Congress was dealing with competition which it sought to protect and monopoly which it sought to prevent. *Brown Shoe Co. v. United States*, 370 U.S. 294, 334 (1962) and see historical discussion Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 Col. L. Rev. 555, 574-579 (1973). Congress had "at least equal concern with the fate of small producers driven out of business." C. Kayen and D. Turner, *Antitrust Policy, An Economic And Legal Analysis*, Harvard University Press (1965) at 19.

economists that depends on rigorous presuppositions never shown to be met here; that is rejected or qualified by many economists; and that is at war with the uncontroverted record in these proceedings. Third, the decision reads the Sherman Act as concerned solely with efficiency (as viewed by the monopolist)—in this instance the efficiency of a monopolist in the process of expanding its market by driving out hundreds of independent firms—and as utterly uncerned with the goal of preserving access by traders to unrestrained, competitive markets, at least when such markets can be preserved without discernible efficiency costs. Fourth, the *en banc* majority violated its appellate function by improperly basing its creative presumption of legality on an economic theory which was not presented—nor tested—at trial.

In sum, this Court should issue the writ of certiorari to review the unprecedented presumption of legality for a vertical extension of a monopoly, the far reaching application of that presumption and the highly improper procedure used by the sharply divided *en banc* Court of Appeals in adopting this novel presumption.

This Court must not allow the unsupported "optimum monopoly price" theory predicting possible efficiency to dictate results in a Section 2 antitrust case and frustrate judicial process, Congressional policy and small business enterprises by extension of monopoly power into a separate market without constraint.

A.

THE COURT OF APPEALS IMPROPERLY ADOPTED A NOVEL PRESUMPTION OF LEGALITY TO ALLOW MONOPOLY POWER USE AS LEVERAGE TO CREATE ANTICOMPETITIVE EFFECTS IN A SEPARATE MARKET.

The novel presumption of legality for the vertical extension of a monopoly established by the *en banc* majority directly conflicts with the established holdings of this Court and other federal courts under Section 2 of the Sherman Act.

(1) **Legal Standards.** A plaintiff must establish two elements to prove monopolization under Section 2: possession of monopoly power and the purpose or intent to exercise that power for anticompetitive or exclusionary purposes. *United States v. Grinnell Corp., supra* at 570-571. As noted, the first element—monopoly power—is unequivocally satisfied in the instant case. Pet. App. A5. The second element—intent to monopolize—is satisfied when plaintiff proves that the monopolist's conduct has caused unreasonable anticompetitive effects in a relevant market. *United States v. Griffith, supra* at 106. Thus, the focus in this case is on the rules that govern determination of anticompetitive effects.

With respect to a monopolist's actions in a vertically related market, the courts assess the lawfulness of those actions under a rule of reason analysis. This involves: (a) a balancing of anticompetitive and procompetitive effects of the conduct; (b) in the specific factual circumstances of the particular firm's behavior; and (c) a determination that the behavior is unreasonable, *i.e.*, proscribed, if the proven anticompetitive effects outweigh the proven procompetitive effects. If the monopolist's actions in the

vertically related market completely destroy competition, then that behavior is presumptively *un*lawful because "no monopolist monopolizes unconscious of what he is doing."[7] As the United States acknowledged in its brief on appeal in this case (at p.7):

> ". . . the existence of monopoly power alters the rule of reason standard applied where monopoly power does not exist. It makes *the courts less willing to tolerate the anticompetitive potential of the dominant firm's conduct* and more demanding of proof that potentially restrictive conduct is the least restrictive manner of providing important benefits to consumers." [Emphasis supplied.]

The danger addressed by the Sherman Act is the willful exercise of the monopoly power without constraint. This exercise downstream in a vertical line to extend an existing monopoly and to gain advantages over existing competition in a second market was shown by undisputed evidence to result in anticompetitive action. But such an exercise of monopoly power alone is a violation of Section 2 and prohibited regardless of the economic rationale submitted by defendant to justify same. *United States v. Griffith, supra*, and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

These applicable rules for determining unreasonable anticompetitive effects in a Section 2 case involving a vertical extension of monopoly come from two lines of cases.

(a) **Using Monopoly Power to Destroy Competition in a Related Market.** In *United States v. Griffith*,

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7. *American Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946), quoting Judge Hand in *United States v. Aluminum Company of Amer.*, 148 F.2d 416, 432 (2d Cir. 1945); *see also Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58 (1911).

supra, this Court squarely held that a monopolist can not use its power in one market to gain a monopoly in a second market. Relying on Section 2, the Court invalidated an arrangement where defendant used its monopoly power over theatres in some cities to obtain the exclusive rights to distribute movies to theatres in other cities, thus extending its monopoly from one theatre market to another. As this Court stated:

> ". . . the use of monopoly power . . . to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. . . . If monopoly power can be used to begat monopoly, the Act becomes a feeble instrument indeed." *Id.* at 107-108.

In *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948), this Court made clear that a monopolist can not leverage its power from one market to take over a second market whether or not the second market is related horizontally with the first (as in *Griffith*) or vertically (as where a monopolist producer integrates into the retail market). *Id.* at 174. The teaching of both *Griffith* and *Paramount Pictures* is that a monopolist's behavior—tested by rule of reason analysis that looks to the *actual* effects on competition—is presumptively unlawful where that behavior destroys existing competition in a second market. This Court held in *Griffith* that extension of monopoly power, without more, was a violation of Section 2.

The courts of appeals have consistently adhered to this fundamental principle. Thus, in *Berkey Photo, Inc. v. Eastman Kodak Co., supra,* Judge Kaufman, relying on *Griffith,* held:

> "[*A*] *firm violates* §*2 by using its monopoly power in one market to gain a competitive advantage in another,* albeit without an attempt to monopolize the second market. . . . *This conclusion appears to be an*

> *inexorable interpretation of the antitrust laws.* . . . That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct." *Id.* at 275 [Emphasis supplied.]

The rule barring the unreasonable leveraging of monopoly power in a related market as applied in *Griffith, Paramount Pictures* and *Berkey* has been followed by the Third Circuit,[8] the Fifth Circuit,[9] the Seventh Circuit,[10] and the Ninth Circuit.[11]

(b) **Monopolist's Refusal to Deal in a Vertically Related Market.** In *Eastman Kodak Co. v. Southern Photo Materials Co., supra,* this Court held that a monopolist can not refuse to deal with its competitors where it destroys those competitors or gains a monopoly in a second market.[12] In that action, Kodak unlawfully used its monopoly power in the wholesale market for certain photographic supplies when Kodak attempted to buy out a retailer's independent business, while, at the same time, refusing to deal with the retailer at wholesale. This Court inferred the existence of the second element of monopolization under Section 2—intent to monopolize—from Kodak's absolute refusal to deal which destroyed all

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8. *SmithKline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056, 1065 (3d Cir.), *cert. denied,* 439 U.S. 838 (1978).

9. *Poster Exchange, Inc. v. National Screen Service Corp.,* 431 F.2d 334, 339-340 (5th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971).

10. *Sargent-Welch Scientific Co. v. Ventron Corp.,* 567 F.2d 701, 712-713 (7th Cir. 1977), *cert. denied,* 439 U.S. 822 (1978).

11. *See Greyhound Computer Corp. v. IBM Corp.,* 559 F.2d 488, 503 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978).

12. *See also United States v. Colgate Co., supra* (a firm may refuse to deal with anyone it chooses only "in the absence of any purpose to create or maintain a monopoly").

competition in the retail market. 273 U.S. at 375. Similarly, in *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973), this Court held that a monopolist at one market level violates the Sherman Act when it refuses to deal with competitors at a second market level, thereby destroying competition at the second market level.[13]

Moreover, in *Byars v. Bluff City News Co., supra* at 860, the Sixth Circuit, faced with the issue of a monopoly firm's refusal to deal at wholesale with an independent distributor who sold periodicals at retail, held that the monopolist's conduct must be evaluated as to its *actual* impact on competition in the retail market:

> ". . . what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices . . . a practice should be deemed 'unfair' or 'predatory' only if it is unreasonably anticompetitive. In a §2 case, *only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anticompetitive and thus unlawful.*" [Emphasis supplied.]

In *Byars,* the Sixth Circuit remanded to the district court the issue of whether the monopolist's conduct would cause unreasonable anticompetitive effects in the retail market, thus holding that a monopolist may not simultaneously refuse to deal with all of its distributors and extend its monopoly forward where such conduct would destroy competition. *Id.*

(2) **The En Banc Majority's Presumption of Legality.** The *en banc* majority's holding in this case is in sharp conflict with the rules established by this Court and the courts of appeals for determining when a monopolist's

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13. In *Otter Tail,* the Court held that a monopoly firm can not refuse to deal in order "to foreclose competition or gain a competitive advantage or destroy a competitor." 410 U.S. at 377.

destruction of competition in a vertically related market is unreasonably anticompetitive.

The *en banc* majority relied on the academic theory of "optimum monopoly price" which, in effect, posits that vertical extension of monopoly by a monopolist is presumptively lawful. Indeed, the leading proponents of this theory explicitly contend that such action by a monopolist should be presumptively lawful. P. Areeda & D. Turner, *Antitrust Law* ¶¶ 723-26 (1978); Pet. App. A16-A17; R. Posner, *Antitrust Cases, Economic Notes and Other Materials* 704-08 (1974). See also *Byars v. Bluff City News Co., supra* at 861, fn. 48.

The *en banc* majority makes clear that it has adopted the presumption of legality sought by the proponents of the "optimum monopoly price" theory. While conceding that petitioners had proven anticompetitive effects at trial —elimination of potential competition, increased prices and reduced options for consumers—the *en banc* majority, concluded that those proven anticompetitive effects would not suffice: "appellees [petitioners] have not borne their burden as plaintiffs of proving that the *procompetitive effects generated by optimum monopoly pricing* and the unique nature of a newspaper's revenues are outweighed by the minimal anticompetitive effect of eliminating potential competition from the retail market." Pet. App. A22 (emphasis supplied). Although there was *no* evidence of these theoretical procompetitive effects and, moreover, the uncontroverted evidence disproved their very existence, the *en banc* majority nevertheless presumed that these supposed effects cannot be overcome by actual proof at trial of uncontroverted anticompetitive effects.

In so doing, the *en banc* majority has created a major conflict with the fundamental rules for judging the vertical extension of monopoly as established in the cases both

of this Court and the courts of appeals. Indeed, the *Griffith - Paramount Pictures* and *Eastman Kodak - Otter Tail* lines of decisions establish a presumption of *illegality* when a monopolist uses its monopoly power to completely destroy competition in a related market. The holding of the *en banc* majority is diametrically opposed to this principle. At the very least, plenary review is necessary to resolve this fundamental conflict.

The Star Company's monopolization of the retail sales market was to be accomplished by a prospective refusal to sell to existing independent retail businesses in a currently competitive market. The effect of the refusal to sell would eliminate the independent retail businesses and create a vertically extended monopoly. None of the exceptions recognized by this Court in *United States v. Grinnell Corp., supra* at 570-571, to allow the lawful creation or growth of a monopoly were present. The extension would take place because of a unilateral decision and direct action of the monopolist. Review is thus necessary to establish the limits on a monopolist's vertical extension of monopoly.[14]

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14. Relying on the Areeda theory of vertical integration, P. Areeda & D. Turner, *Antitrust Law* ¶¶ 725, 726 (1978), the *en banc* majority in the Eighth Circuit would hold that a monopolist's vertical integration may be anticompetitive *only* in the very limited situations where the monopoly firm was intending either: (a) to discriminate in price at the retail level; or (b) to raise entry barriers at the production level; or (c) to evade government regulation. Pet. App. A18-A19. By narrowly construing these three exceptions to its presumptive rule of legality, the Eighth Circuit would always presume a monopolist's forward integration lawful. In fact, as the uncontroverted evidence shows here, by setting a uniform price, the Star Company would be discriminating among consumers in differing retail submarkets in the Kansas City SMSA because its marginal costs of delivery will vary widely. In addition, by refusing to deal at the wholesale level, the Star Company undisputedly would raise very substantial entry barriers for independent distribution of newspapers in the Kansas City SMSA. More fundamentally, the Eighth Circuit's limited exceptions completely ignores discrimination in service—including once a day (or less frequent) delivery to some areas and fewer billing options—that the uncontroverted facts show would come from the Star Company's vertical integration.

B.

THE EN BANC MAJORITY VIOLATED ITS APPELLATE FUNCTION BY CREATING A NOVEL PRESUMPTION OF LAW OUT OF AN ABSTRACT ECONOMIC THEORY THAT WAS NOT RAISED AT TRIAL, THAT WAS NOT TESTED AGAINST THE FACTS OF THIS DISPUTE, AND THAT WAS FLATLY CONTRADICTED BY THE UNCONTROVERTED EVIDENCE.

The *en banc* majority flatly violated its appellate function by adopting an abstract economic theory presented *de novo* on appeal to fashion a presumptive rule of antitrust law. This Court must make it absolutely clear to the courts of appeal that emerging economic theories—particularly those hotly contested by experts—can not be used to justify novel antitrust principles that modify or undercut fundamental antitrust doctrine established by this Court unless such theories are tested in the factual circumstances of the dispute. Such abstract decision making by any court of appeals is unsound as a matter of developing new antitrust doctrine and unfair to the parties as a matter of appellate procedure.

(1) **Evidence Presented at Trial.** As noted, the Star Company presented no economic experts at trial and offered no testimony on the theory of "optimum monopoly price" Pet. App. A39. Moreover, the Star Company presented no evidence showing the relationships between its circulation figures and advertising revenues, or the supposed procompetitive effects from its delivery agent plan that the *en banc* majority presumed to exist because of "the unique nature of a newspaper's revenues." Pet. App. A22. In contrast, petitioners presented testimony of an economist, Dr. Frederick Kirby, who testified as to the anticompetitive effects of the Star Company's vertical inte-

gration, including elimination of competition, increases in retail prices and dimunition in services. Dr. Kirby also testified to the lack of efficiencies and the absence of other purported procompetitive effects of respondent's delivery agent plan in the context of this case. Pet. App. A47-A48.

(2) **The En Banc Majority's Violation of Its Appellate Function.** As noted, rule of reason analysis requires an appellate court to review the trial court's weighing of the procompetitive and anticompetitive effects demonstrated by evidence presented at trial. The proper appellate function under the Sherman Act does not permit judicial speculation about the existence of effects which were not proven at trial. As Justice Stewart, sitting as a court of appeals judge in *Marrese v. Amer. Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1100 (7th Cir. 1982), recently cautioned:

> "Speculation should not replace factual analysis in evaluating the merits of any lawsuit; it is a particularly inappropriate tool with which to evaluate a 'Rule of Reason' antitrust claim."

More fundamentally, the *en banc* majority's reliance on abstract theory and speculation to fashion a novel presumption of law is a highly improper approach for developing new antitrust doctrine which is dispositive of the real controversy presented. The courts of appeal should not create new doctrine that modifies or undercuts established principles based on academic theories never tested in the factual circumstances of a real dispute. As the Second Circuit held in *United States v. American Cyanamid Co.*, 719 F.2d 558, 567 (2d Cir. 1983), it is "error to apply 'contemporary economic theory' to the extent it may be distinct from precedent, and to fail to apply the standard framework of analysis." The impropriety of the *en banc* majority's approach is readily apparent here.

First, adoption of an abstract academic theory presented only on appeal does not afford the necessary opportunity to test the theory in the factual context of the case to see if its assumptions and posited effects are valid. In fact, the uncontroverted evidence at trial demonstrated the inappropriateness of applying the "optimum monopoly price" theory in this case. According to the *en banc* majority, vertical extension of monopoly by a monopolist must be presumed to be procompetitive because either: (1) the consumers will benefit because the monopolist will extract a single optimum monopoly price; or (2) the monopolist can achieve greater efficiencies in retail sales; or (3) the monopolist will provide better services to consumers. Pet. App. A16-A17. See also Areeda & Turner, *Antitrust Law* ¶ 725c (1978). The uncontroverted facts here, however, disprove these very assumptions and the posited procompetitive effects, as the *en banc* majority concedes.

The District Court explicitly found (and the *en banc* majority did not dispute) that the independent retailers did not have monopoly power in the retail market. To the contrary, the District Court found that the Star Company's:

> "Presence tended to have a retardant effect on retail prices [that the distributors charge] to the subscribers, and common sense confirms the reasonableness of that conclusion . . . . The company's refusal to sell to the carriers necessarily means that the retardant effect of the potential competition is eliminated and the company's monopoly extended into the sales and distribution arena." Pet. App. A98.

In addition, there was no evidence the Star Company could be more efficient; indeed, the uncontroverted evidence showed that the opposite was true. Pet. App. A19, A44. Moreover, the *en banc* majority recognized that many of

the retail customers would be getting substantially fewer services, not more, from the Star Company's monopolization of the retail sales market. Pet. App. A22.[15]

Second, by adopting an abstract economic theory presented only on appeal the *en banc* majority also did not allow such a theory to be tested against and compared with other competing theories. Numerous scholars, frequently cited by this Court in its antitrust opinions, would *not* conclude, as the *en banc* majority did, that economic theory always posits procompetitive effects of such conduct by the monopolist:

> "[I]t is also possible that, having gained control over the downstream [market] . . ., the integrated firm will raise prices on its newly monopolized end product. . . . [N]o simple conclusions can be drawn as to whether on balance the vertical extension of monopoly power into a competitive stage makes society better or worse off. The answer, as in many economic problems, depends upon the data of the particular situation." F. Scherer, *Industrial Market Structure and*

15. Moreover, the presumptions made by the *en banc* majority as to the "unique nature" of the newspaper industry had no basis in the factual record. Pet. App. A22. Defendant-respondent raised *de novo* on appeal—and the *en banc* majority adopted without reviewing the evidence—the argument that the Star Company would not raise its retail prices after monopolizing that market because most of its revenues come from advertising, and the higher its retail price, the lower the circulation of its newspapers and the fewer the number of advertisers it will attract. Pet. App. A21. Defendant presented no evidence of these purported cross elasticities of price, circulation and advertising revenues at trial. Absent such evidence of record and findings by the District Court, it would have been just as reasonable for the *en banc* majority to conclude that the elasticity of price to circulation is much higher in a single newspaper city (*e.g.* had the Star Company increased its retail prices from 25 cents to 35 cents circulation may not have dropped that much), or that the elasticity of circulation to advertising in a single newspaper city is much lower (*e.g.*, if circulation dropped by ten percent advertising revenues probably would not drop concomitantly).

Economic Performance (2d Ed. Rand McNally College Publishing Co. 1980).[16]

It is simply wrong for courts of appeals to adopt an academic theory advanced by a party if that party has not presented the theory to the trial court. Otherwise, the trier of fact has no opportunity to test the merits of that theory in the context of competing expert testimony and all the evidence. The *en banc* majority is blatantly at odds with the fundamental traditions of the adversary and the appellate processes.

Third, the *en banc* majority's approach was fundamentally unfair to petitioners. By erecting an unprecedented presumption of legality of the Star Company's conduct, the *en banc* majority imposed an almost impossible standard of proof for antitrust plaintiffs challenging monopoly behavior. Petitioners should not be penalized for failing to rebut a theory never raised at trial, especially where they presented uncontroverted proof of anticompetitive effects that persuaded both the trial court and the panel majority that they had met their burden under the more traditional rule of reason analysis.

(3) **Why Review Is Necessary.** There can be no dispute that emerging economic theories, particularly those of the Chicago School, have challenged long established antitrust principles in a "way as dramatic as Einstein's theory of relativity [has] supplant[ed] Newtonian mechanics."[17] Thus, the fundamental issue of whether the appellate courts should adopt these new theories as presumptive rules of law without adhering to their traditional

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16. *See also* Schmalensee, *A Note on the Theory of Vertical Integration,* 81 Journal of Political Economy 442, 449 (1973).

17. Statement of James C. Miller III, Chairman of the Federal Trade Commission before the Antitrust Section of the American Bar Association (March 23, 1984), *reprinted in, Report From Official Washington,* 53 Antitrust L. J. 1, 8 (1984).

appellate functions will undoubtedly recur in a variety of contexts. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 at 52, fn. 19 (1977).

Plenary review is necessary for this Court to underscore that changes in antitrust doctrine should only occur where novel theories are tested not only against the facts of real disputes but also against countervailing theories. Despite the Chicago School's preference for rules of *per se* legality in antitrust law,[18] this Court should not sanction deviation from rule of reason analysis established by prior precedent.

CONCLUSION

The dissent below voiced concern for the impact on small businesses when monopoly power was set loose without constraint to exploit and destroy. Judge Bright explained the effect of the opinion below with the following concern:

> "The majority in this case, with some hesitation and a degree of uncertainty, permits a monopolist to destroy hundreds of independent businesses. What a sad day for the American ideal that permits every person on his or her own initiative to own and operate a small business." [Pet. App. A28.]

Even Judge McMillian, author of the majority opinion below, recognized the negative aspect of unleashed monopoly power as follows:

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18. *See generally* R. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution*: *Per Se Legality*, 48 U. Chicago L. Rev. 6, 7-8 (1981) ("the Rule of Reason is an amorphous standard that requires . . . the antitrust adjudicator to make a broad-ranging assessment of all competitive, and perhaps all economic, benefits and costs. . . . [T]he idea of balancing the (assumed to be anticompetitive) effects . . . with the (assumed to be procompetitive) effects . . . is infeasible and unsound.")

> "We recognize that on the facts of this case, elimination of Star Co. as a potential competitor will result in the elimination of some procompetitive effects in the retail market. Under the contract carrier system, two competitors existed in the distribution or retail market-one actual (the contract carrier serving the route) and one potential (Star Co.). *Implementation of the delivery agent system would leave only one 'competitor' in the market-Star Co.* Thus, the retail market has lost the beneficial competitive interaction between business entities that the antitrust laws were enacted to preserve. *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958)." [Pet. App. A18.]

The adroit substitution of "one 'competitor' " for what is obviously a monopolist reveals the "hesitation and degree of uncertainty" by which the Court of Appeals reached its decision. The simplistic judicial designation of monopolization as competition does not remove the Congressional constraints against it.

This Court is respectfully urged to affirm and establish standards of conduct under Section 2 of the Sherman Act to prevent vertical extension of a monopoly through use of monopoly power based upon a novel presumption of legality supported by a contemporary economic theory [here the "optimum monopoly price theory"]. The sole use of any such theory is particularly inappropriate where it is inconsistent with facts that establish anticompetitive effects would follow a refusal to sell and would not produce more consumer efficiency but would, in fact, result in higher prices and a narrower range of service to consumers.

For all the foregoing reasons, this Court is urged to grant a Writ of Certiorari and take up the issues presented.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 81-1963 and 82-1390

Gweldon Lee Paschall and All
Intervenors,
Appellees,

v.

The Kansas City Star Company,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri

Submitted: March 14, 1983
Filed: February 6, 1984

Before LAY, Chief Judge, HEANEY, BRIGHT and ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON and FAGG, Circuit Judges, *en banc*.

McMILLIAN, Circuit Judge.

The Kansas City Star Company (Star Co.) appeals from a final order entered in the United States District Court for the Western District of Missouri which permanently enjoined Star Co. from refusing to sell its newspapers to appellees at wholesale. For reversal Star Co. argues that its proposed change in distribution from the

use of independent contract carriers to reliance on delivery agents does not violate the Sherman Act's prohibition against monopolization or attempts to monopolize interstate commerce. 15 U.S.C. § 2 (1976). Star Co. also argues that appellees have suffered no cognizable antitrust injury and that, even if there were such an injury, the permanent injunction is unnecessarily broad to remedy it. In a separate appeal, Star Co. argues that the district court erred and abused its discretion in awarding attorney fees to appellees. For the following reasons, we overrule *en banc* the panel opinion and vacate the permanent injunction as well as the award of attorney fees.

I. FACTUAL BACKGROUND

The facts are set forth in the panel opinions. *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 325-26 (8th Cir. 1982). Star Co. owns the two major daily newspapers in Kansas City, Missouri—*The Kansas City Star* and *The Kansas City Times*. Star Co.'s road to dominance in the Kansas City market, however, was marred by a conviction for attempted and actual monopolization in violation of § 2 of the Sherman Act. *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957). Both newspapers historically were distributed by independent contract carriers who bought the newspapers at wholesale from Star Co. and then resold them to the public at varying retail prices. The retail prices for the newspapers are set by these contract carriers, although in the past Star Co. had some control over the retail prices charged by the contract carriers. The wholesale price is set by Star Co. Originally the wholesale price was a set sum per delivered copy. Later, the wholesale price was calculated as a certain percentage of the retail price charged by the carrier. The percentage charged varied for each contract

carrier based upon, among other things, the retail price that the contract carrier proposed to charge its customers.

Each contract carrier held a contract from the Star Co. which gave it the exclusive right to sell Star Co.'s newspapers along established routes. No contract carrier competed against any other contract carrier for retail business in any significant way. Instead, each contract carrier sold its newspapers only within its own territory or along its own route. Star Co., however, did reserve by contract the right to sell directly to subscribers if it felt that the contract carrier was not providing proper service. This right was exercised on at least one occasion and all of the contract carriers were acutely aware of the existence of Star Co.'s contractual right to compete at the retail level. However, Star Co. seldom delivered newspapers directly to subscribers. Contract carriers considered their Star Co. routes to be their "property," even though the routes existed only because of the exclusive but terminable distribution contracts entered into by each contract carrier and Star Co. When a contract carrier decided to leave the business, the contract carrier would "sell" its route to its successor. If Star Co. approved, the route purchaser would then enter into a new contract with Star Co. and become that route's new contract carrier. Prices for routes sold in this manner ranged into the hundreds of thousands of dollars for the largest routes.

In 1974, Star Co. informed the contract carriers by letter that in the future Star Co. might have to alter the way it distributed its two newspapers. This announcement so upset the contract carriers, all of whom had invested substantial sums in their routes, that it led one of them to bring this antitrust lawsuit. Then, in 1977, Capital Cities Communications, Inc. (Capital Cities) acquired control over Star Co. through a stock tender offer.

Shortly thereafter, Capital Cities announced that it would terminate all contract carriers and replace them with Star Co.'s own delivery agents, thereby enabling Star Co. to sell its two newspapers directly to readers. It was also announced that once the delivery agent system was in place, Star Co. would no longer sell its two newspapers at wholesale to anyone. According to Star Co., the delivery agent system would be a significant improvement over the contract carrier system because Star Co. could set an area-wide uniform price for its newspapers and provide readers with better, more responsive service. Star Co. welcomed the current contract carriers to apply for positions as delivery agents. As an inducement, Star Co. promised that delivery agents would earn approximately the same income as the contract carriers had earned.

In response to these announcements, plaintiff-appellee Gweldon Paschall, along with approximately 250 other contract carriers, moved for and obtained a preliminary injunction against Star Co. barring it from implementing the delivery agent system. After a non-jury trial on the merits, the district court found that Star Co.'s planned vertical integration into delivery, coupled with its refusal to deal with the contract carriers, would violate § 2 of the Sherman Act, 15 U.S.C. § 2, because it would permit Star Co. to extend its monopoly in newspaper publishing into the retail newspaper market. The district court, therefore, permanently enjoined Star Co. from refusing to deal with the contract carriers or dealing with them in a discriminatory or predatory manner.[1] On appeal a divided panel of this court affirmed the permanent injunction but reduced the district court's award of attorney fees to

1. The district court certified the action for interlocutory appeal. This court initially granted leave to appeal but later vacated it as improvidently granted. *Paschall v. Kansas City Star Co.,* 605 F.2d 403 (8th Cir. 1979).

appellees to $2.5 million. *Paschall v. Kansas City Star Co.*, 695 F.2d at 333-34, 338. On Star Co.'s petition, this court agreed to reconsider the case *en banc*.

II. § 2 OF THE SHERMAN ACT - MONOPOLIZATION

There are two basic elements of a § 2 Sherman Act violation. The first is the "possession of monopoly power[2] in the relevant market" and the second is the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The first element is easily disposed of in this case. The district court found that Star Co. had a monopoly in the wholesale metropolitan daily newspaper market. We adopt the district court's finding of monopoly power because it is not clearly erroneous. *See Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334, 338 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). The second element, as it applies to the facts of this case, is more difficult to ascertain.

A. *Specific Intent or Purpose*

Generally, cases following the Supreme Court's landmark § 2 Sherman Act decisions rendered during its 1947 Term have imposed liability for unlawful monopolization upon proof of either (1) the specific intent to monopolize

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2. Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" any part of interstate or foreign commerce. Monopoly power is the "power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and, "whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised." *United States v. Griffith*, 334 U.S. 100, 107 (1948).

or (2) anticompetitive effects that result from the monopolist's actions. *See United States v. Columbia Steel Co.*, 334 U.S. 495, 531-32 (1948) (*Columbia Steel*); *United States v. Griffith*, 334 U.S. 100, 106 (1948) (*Griffith*). One need not prove both specific intent and anticompetitive effects; either alone is a sufficient basis for the imposition of liability upon a business entity wielding monopoly power. *Griffith*, 334 U.S. at 105; *Columbia Steel*, 334 U.S. at 531-32. This rule proceeds from the premise that although monopolies are tolerated, they are not cherished. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Thus, a business entity that possesses monopoly power cannot lawfully exercise it with the specific intent of restraining competition because such actions entail a "dangerous probability" that the consequences prohibited by the Sherman Act may result. *Griffith*, 334 U.S. at 105-06, *citing Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). Similarly, a monopolist acting with a "pure heart" may not engage in activities which would directly and necessarily result in the unreasonable restraint of competition because that result is the specific evil which the Sherman Act was passed to prevent. *Id.*; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 271-75.

As the Supreme Court made plain in *Griffith*, 334 U.S. at 107-08,

> [i]t follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.
>
> . . . .
>
> . . . If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed. . . . [An action by a monopolist] may yield

price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor, as we hold in *United States v. Paramount Pictures, Inc.*, [334 U.S. 131 (1948),] may it be used to stifle competition by denying competitors less favorably situated access to the market.

In the context of vertical integration,[3] the requisite specific intent may be shown where the vertical integration was part of "a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948). Specific intent to monopolize is also found where the monopolist, or would-be monopolist, engages in predatory tactics or "dirty tricks." *See, e.g., Byars v. Bluff City News Co.*, 609 F.2d 843, 853-54 (6th Cir. 1979) (*Byars*).[4] The record before

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3. Vertical integration is the inclusion within a single firm of two or more stages in the production or distribution of an end product. A firm integrates "downstream" or "forward" when it undertakes further processing or distribution of a product that has been or could be sold to independent producers or distributors. The key difference between vertical integration by a competitive firm and vertical integration by a monopolist is that monopoly at one stage of the production-distribution process may carry with it the power to affect competition in earlier or later stages.

Paschall v. Kansas City Star Co., 695 F.2d 322, 327 n.6 (8th Cir. 1982), *citing* 3 P. Areeda & D. Turner, Antitrust Law ¶¶ 723-725 (1978).

4. As it has often been stated in case law,

mere possession of monopoly power is not illegal. A monopolist which achieves that status because of "a superior product, business acumen, or historic accident" cannot be faulted. Such monopolists are "tolerated but not cherished" because of "considerations of fairness and the need to preserve proper economic incentives." However, if a monopolist abuses its monopoly power and acts in an unreasonably

(Continued on following page)

us discloses no evidence of Star Co. engaging in any "dirty tricks" or predatory practices against its contract carriers.

Liability based on specific intent can be negated where valid business justifications exist for the monopolist's actions. *Cf. Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 352, 375 (1927) (absence of valid business justification for manufacturer's refusal to sell to dealers at wholesale is grounds for imposing antitrust liability). *See also Becker v. Egypt News Co.*, 713 F.2d 363, 368 (8th Cir. 1983); *Byars*, 609 F.2d at 862-63; *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 475 (D.D.C. 1977); *McGuire v. Times Mirror Co.*, 405 F. Supp. 57, 66 (C.D. Cal. 1975); *Lamarca v. Miami Herald Publishing Co.*, 395 F. Supp. 324, 327 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975). Here Star Co. has offered several legitimate business reasons for adopting the delivery agent system, including (1) the ability to set an area-wide uniform retail price to facilitate "in-paper advertising" for new subscriptions and simplify subscription collection and (2) the capability to be more responsive to customer complaints and assure more rapid starts for new subscribers.[5] Star Co. has argued that

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Footnote continued—

> exclusionary manner vis-a-vis rivals or potential rivals, then § 2 [of the Sherman Act] is violated.

Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979) (citations and footnote omitted). As noted in *Byars, id.* at n.27, the classic "natural" monopoly is that possessed by a utility company in a city or the single newspaper in a small town. On remand in *Byars* the district court found that Bluff City's conduct was fair competition and not "dirty tricks." *Byars v. Bluff City News Co.*, 683 F.2d 981, 983 (6th Cir. 1982) (per curiam).

5. *See* P. Areeda, Antitrust Law ¶ 729.7a, at 197-98 (Supp. 1982):

> The publisher [may conclude] that his circulation goals are not fully shared by an independent wholesaler [or, in the present case, independent distributor]. The latter's profits are entirely a function of [its] wholesale-retail margin and [its] volume, while the publisher's profits are a function of

(Continued on following page)

because these points had caused Star Co., and its readers, problems under the contract carrier system, it has the unfettered business prerogative to correct these problems in the most efficient manner possible. According to Star Co., the delivery agent system is the most efficient resolution of these problems.

We readily agree with Star Co. that the existence of legitimate business reasons for its decision to integrate forward from the wholesale level (first level) to the retail or distribution level (second level) will negate any specific intent basis of liability. Proof of specific intent is necessary, however, only "where the acts fall short of the results condemned by the Act." *Griffith,* 334 U.S. at 105, 108; *United States v. Paramount Pictures, Inc.,* 334 U.S. at 173.

B. *Anticompetitive Effects*

The results condemned by § 2 of the Sherman Act include the acquisition, maintenance, or extension of monop-

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Footnote continued—

> both (1) the wholesale price, publication cost, and volume of newspapers sold and (2) advertising revenue, which also depends upon circulation volume. This means that increased circulation volume is more valuable to the publisher than to the dealer (unless, of course, the publisher were, unusually, to share [its] advertising revenue with the wholesaler). The implications are two-fold. The publisher has a greater incentive (1) to assure higher quality service to subscribers than an independent distributor and also (2) to eliminate any excess costs or margins at the distribution levels. Moreover, because the distributors do not compete with each other, there is no market pressure on the dealers to hold their margins down and service up. Of course, the publisher might attempt to supervise the dealer's service by contract, but precedent condemns the contractual limitation of maximum prices [, *citing, Albrecht v. Herald Co.,* 390 U.S. 145 (1968)]. The publisher may therefore conclude that self-distribution would improve service and minimize prices to subscribers.

But cf. Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics,* 27 Mercer L. Rev. 1061 (1976), *reprinted in* T. Calvani & J. Siegfried, Economic Analysis and Antitrust Law 20-24 (1979).

oly power through improper means. Here, appellees argue that Star Co. has abused its monopoly power in the wholesale market by integrating forward into distribution and refusing to deal with would-be competitors.[6] Appellees contend that the combined result of Star Co.'s vertical integration and refusal to deal has been Star Co.'s acquisition of a monopoly in the retail market and a concomitant extension of Star Co.'s monopoly power in the wholesale market. Neither vertical integration nor a unilateral refusal to deal is *per se* illegal. *Columbia Steel,* 334 U.S. at 525 (vertical integration); *United States v. Russell Stover Candies, Inc.,* No. 82-2036 (8th Cir. Sept. 29, 1983) (unilateral refusal to deal). Both actions are normally judged under a § 1 rule of reason standard. However, the "improper means" by which a monopolist acquires, maintains, or extends its monopoly in violation of § 2 are often equated with conduct that would violate § 1 if it were done in concert with others.

> [A monopolist] usually does not violate § 2 of the Sherman Act unless [it] has acquired or maintained [its] strategic position, or sought to expand [its] monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. For those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1.

Griffith, 334 U.S. at 106. *See United States v. Paramount Pictures, Inc.,* 334 U.S. at 171; *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d at 274.

Under § 1 of the Sherman Act's prohibition against unreasonable restraints of trade, the principal inquiry is whether the conduct complained of results in any un-

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6. *See generally* authorities cited in *Byars v. Bluff City News Co.,* 609 F.2d at 846 n.2.

reasonable anticompetitive effects. *Columbia Steel,* 334 U.S. at 527. Hence, the central issue of this case is whether the combination of Star Co.'s vertical integration and refusal to deal has resulted in any *unreasonable* anticompetitive effects in the market. If no unreasonable anticompetitive effects will follow from Star Co.'s implementation of its delivery agent system, its de facto acquisition of a monopoly of the retail daily metropolitan newspaper market will not be condemned by § 2 of the Sherman Act, because the Sherman Act protects the benefits of competition and not just individual competitors. Absent the specific intent to monopolize, a monopolist's legitimate business decisions will not be curtailed if those decisions promote the redeeming virtues of competition: lower prices, greater efficiency and innovation, and more responsive service. *See Continental T.V. Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 52-57 (1977); *Columbia Steel,* 334 U.S. at 526-29.

Two contrasting theories have been advanced in this case to provide a conceptual framework for ascertaining and analyzing the impact of Star Co.'s proposed change in its method of distribution. One theory, the potential competitor theory, has been relied upon to impose liability on Star Co. The other, the optimum monopoly price theory, has been used in defense.

1. Potential Competitor Theory

The potential competitor theory was first discussed in *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 532-33 (1973). In *Falstaff,* the defendant had decided to expand into the New England market by merging with an existing New England brewery. The Court held that entry through merger would violate § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), if the entry had the effect of eliminating "a potential competitor exercising present in-

fluence on the market." 410 U.S. at 532. It is said that a potential competitor, merely by its presence at the edge of the market, will have a retardant effect on price and will provide an incentive for better service among those already in the market. This is so because if the existing market competitors practice price gouging or provide inferior service, the potential competitor will enter the competitive fray with lower prices and better service, thereby capturing a substantial share of the market. To avoid the possibility of losing business to the potential competitor, the actual market competitors will maintain low prices and quality service. Thus, should the potential competitor merge with an existing market competitor, the market will lose the procompetitive effect of the presence of a potential competitor. The Court in *Falstaff* remanded the case to determine whether Falstaff was a potential competitor "in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market." *Id.* at 532-33. If Falstaff was a potential competitor, the merger would be unlawful under § 7 of the Clayton Act.

The district court grafted this potential competitor theory onto § 2 of the Sherman Act and applied it to the facts of this case. The district court found that Star Co. held a monopoly in the wholesale newspaper market. The district court also found that although Star Co. had not competed in the retail newspaper market to any significant degree in the past, Star Co. nonetheless existed as a powerful competitive force in the retail newspaper market because it was a potential competitor. Star Co. reserved by contract the right to sell directly to subscribers if it felt that the contract carrier was not providing proper service. As an example of this theory at work, the district court pointed to what has been referred to as the "Louisberg Square incident." In April of 1970, a contract carrier

"arbitrarily" raised its retail subscription price for *The Star* to readers in an apartment complex known as Louisberg Square. Many residents of Louisberg Square complained to Star Co. about the price increase. Eventually, Star Co. delivered its newspapers at a lower price directly to those dissatisfied Louisberg Square residents who requested direct delivery from Star Co. All of the contract carriers were aware of the Louisberg Square incident, and they all knew that a similar fate possibly could befall them should they engage in price gouging or give their subscribers poor service. Thus, according to the district court, the mere presence of Star Co. as a potential competitor in the retail market produced a substantial retardant effect on the contract carriers' prices and gave the contract carriers a significant incentive to provide the best service possible. The district court went on to observe that Star Co.'s forward integration into the retail market, coupled with its refusal to deal with contract carriers, removed the beneficial influence on competitive conditions in the retail market exerted by Star Co.'s presence as a potential competitor. The district court concluded that Star Co.'s removal of its competitive impact from a market would violate § 2 of the Sherman Act because it would enable Star Co. to expand its monopoly in the wholesale market into the retail market, *citing Griffith,* 334 U.S. at 108.

The panel majority accepted the district court's potential competitor theory, but subjected the theory to a more rigorous and searching antitrust analysis. The panel majority primarily focused on the anticompetitive effect basis of § 2 liability. It stated that § 2 liability could be found only if the monopolist's vertical integration resulted in "substantial anticompetitive effects that are not offset by production economies, savings in market transaction costs, or other competitive benefits." *Paschall v.*

Kansas City Star Co., 695 F.2d at 327. After a careful review of the record evidence, the panel majority concluded that

> the anticompetitive consequences of the Star's proposed refusal to deal [, that is, the proposed change in the system of distribution from independent contract carriers to delivery agents,] will likely outweigh any competitive benefits. The refusal will eliminate the Star as a potential competitor in the retail market, will likely result in higher prices and poorer services to readers, and will not lead to a more efficient delivery system.

Id. at 328-29. All in all, the panel majority concluded:

> the [record] evidence . . . [showed] that the Star's proposed refusal to deal will produce anticompetitive effects on retail prices and services without accomplishing any savings in market transaction costs or creating production economies. The economic theory advanced by the Star and *amicus*, standing alone without factual support in the record, is insufficient to rebut that evidence.

Id. at 332.[7]

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7. The potential competitor theory, as adopted by the district court, has been labeled an "internal contradiction" by at least one leading antitrust commentator. *See* P. Areeda, Antitrust Law ¶ 729.4b5, .7f (Supp. 1982). Professor Areeda offered four major criticisms of the district court's potential competitor theory. First, the potential competitor theory reflects "a social skepticism about market entry through merger or joint venture and a social preference for internal expansion," yet the district court used the theory to "condemn internal expansion." *Id.* ¶ 729.4b5, at 183. The record evidence in this case, however, shows that the proposed delivery agent system is more like an acquisition of another business than it is an internal expansion. Under Star Co.'s proposal, former contract carriers will simply sign new contracts. The contract carriers will continue to use their own trucks, personnel, and customer lists. Only the label and the ability to set retail prices have changed.

(Continued on following page)

2. Optimum Monopoly Price Theory

The panel dissent championed the optimum monopoly price theory advanced by Star Co., the *amicus*,[8] and several

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Footnote continued—

Second, any influence from Star Co.'s potential competition would be illusory if the antitrust laws prevented Star Co. from actually entering the market as a self-distributor. *Id.* In the abstract, the point is well taken. However, the district court's injunction did not prevent Star Co. from entering the retail market; it only prevented Star Co. from refusing to deal with its retail competitors (the independent contract carriers) when it did enter the market. Thus, the potential for head-to-head retail competition between Star Co. and the contract carrier on a particular route would not be diminished by the district court's injunction.

Third, any actual competition would be ineffective because the cost of distribution for the publisher would be prohibitively high. "Soliciting particular subscribers and making widely separated deliveries would appear to involve unusually high distribution costs." *Id.* n.20. By contrast, the typical independent contract carrier who actually delivers the newspaper to the home subscriber does not compete against the other independent contract carriers. "[E]ach has a contractual or de facto exclusive territory, reflecting apparent economies of scale. Speaking loosely, one carrier can serve all the houses in a given block more cheaply than two carriers can each serve every other house over two blocks." *Id.* ¶ 729.7a, at 197. However, the extent of Star Co.'s initial costs in entering the market should be no greater than the initial costs experienced by the contract carriers who expended a great deal of money in purchasing the routes they serve. Professor Areeda also noted that, given the holding in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), actual competition might expose the publisher to antitrust liability for unlawful maximum resale price maintenance. However, Star Co. would not be guilty of maximum resale price maintenance if it abstained from predatory tactics in competing against the contract carriers. Moreover, the effectiveness of Star Co.'s direct competition was felt during the Louisberg Square incident when Star Co. readily entered the retail market despite the higher costs and relative inefficiency of limited delivery.

Fourth, the district court's order reflected an unfounded concern that the publisher would charge excessive rates. *Id.* at 183-84. Star Co. already had control over the retail price through its control over the wholesale price charged to the contract carriers. We believe that this criticism is more properly directed to the merits of the optimum monopoly price theory. *See* discussion *infra*.

8. The United States Department of Justice.

leading antitrust economics scholars of the "Chicago school."[9] As a fundamental premise, the panel dissent emphasized that monopolies, even forwardly integrating monopolies, are not in and of themselves illegal. *Id.* at 340 (Henley, J., dissenting). Rather, forward vertical integration by a monopolist violates § 2 of the Sherman Act only if it results in unreasonable anticompetitive effects. *Id.* The panel dissent then took the position that no *unreasonable* anticompetitive effects will flow from the implementation of Star Co.'s delivery agent system. *Id.* at 340-43.

The optimum monopoly price theory can be summarized as follows. Under any given set of cost and demand curves for a product, there is one price at which a monopolist can maximize its profits. This price is determined by computing the quantity of product that is produced at the point where the monopolist's cost in making one more item (marginal cost) equals the revenue received from selling that additional item (marginal revenue). The price at which the public will buy all of that quantity, but no more (demand curve), will be the optimum monopoly price. If the monopolist charges more than this price, its profits will decline because the lost revenues from the reduced number of sales would more than offset the added revenue from the higher price. If the monopolist charges less, the added revenue from increased sales will not com-

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9. *See* R. Bork, The Antitrust Paradox (1978) (now Judge Bork of the United States Court of Appeals for the District of Columbia Circuit); R. Posner, Antitrust Law: An Economic Perspective (1976) (now Judge Posner of the United States Court of Appeals for the Seventh Circuit). *See also* P. Areeda & D. Turner, Antitrust Law (1978-80). *But cf.* Lande, *Wealth Transfers as the Original & Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65 (1982) (as the title suggests, the author agrees that Congress passed the antitrust laws to further economic objectives but argues that the economic objectives were primarily of a "distributive" rather than an "efficiency" nature, that is, to prevent unfair acquisitions of consumers' wealth by firms with market power).

pensate for the reduced revenue per sale and the added marginal costs in producing that quantity. Thus, the monopolist's profit will be less than at the optimum monopoly price. *See id.* at 328, *citing* 3 P. Areeda & D. Turner, Antitrust Law ¶¶ 725-26 (1978), R. Bork, The Antitrust Paradox 242-43 (1973), *and* R. Posner, Antitrust Cases, Economic Notes & Other Materials 704-08 (1974).

If the demand for the product is at all elastic, forward vertical integration may have substantial procompetitive effects in the form of lower prices and more efficient use of resources. Further, Star Co. points out that a large portion of its revenue comes from advertising. For that revenue Star Co. must compete with many other media and, quite significantly here, advertising revenues, in turn, are dependent upon circulation. The result is that Star Co. has a greater incentive than the contract carriers have to keep the retail price as low as possible in order to increase circulation. Star Co. contends that this need to increase circulation provides a greater retardant effect on prices than any influence it exerted in the market by its mere presence as a potential competitor. Thus, even if one assumes the potential competitor theory to be true, the procompetitive effects lost through the elimination of Star Co. as a potential competitor are more than offset by the increase in procompetitive effects in the retail market generated by optimum monopoly pricing combined with Star Co.'s need to increase circulation and attract advertising.

III. EVALUATION OF ANTICOMPETITIVE EFFECTS

Each of the above theories contains a certain amount of truth about the effect Star Co.'s proposed change in distribution will have on the retail newspaper market in the Kansas City area. In applying these theories to the *facts* of this case, we must bear in mind the fundamental princi-

ples of antitrust law discussed above. Moreover, we are mindful that the burden of proof is not on the defendant to prove the absence of anticompetitive effects. Rather, it is the plaintiff's responsibility to prove all the elements of an antitrust violation.

We recognize that on the facts of this case, elimination of Star Co. as a potential competitor will result in the elimination of some procompetitive effects in the retail market. Under the contract carrier system, two competitors existed in the distribution or retail market—one actual (the contract carrier serving the route) and one potential (Star Co.). Implementation of the delivery agent system would leave only one "competitor" in the market—Star Co. Thus, the retail market has lost the beneficial competitive interaction between business entities that the antitrust laws were enacted to preserve. *Northern Pacific R.R. v. United States,* 356 U.S. 1, 4 (1958). However, the loss of the procompetitive effects engendered by the substitution of Star Co. for the contract carriers, that is, Star Co.'s forward integration into the retail market as a self-distributor, may be offset by the introduction into the market of the procompetitive factors under which Star Co. must function as the sole "competitor" in the retail market. The optimum monopoly price theory is useful in ascertaining whether such procompetitive effects are sufficient to counteract the anticompetitive effects of removing potential competition from the market so that in the end there are no *unreasonable* anticompetitive effects.

It may well be true, as the panel majority opinion pointed out, that in certain circumstances a first level monopolist will desire to integrate forward even if it is less efficient than the second level entity. 695 F.2d at 328. These situations include (1) price or service discrimination, (2) increased barriers to entry at the first level, and (3)

evasion of government regulation of first level monopoly profits. *See* F. Scherer, Industrial Market Structure and Economic Performance 302-06 (2d ed. 1980); McGee & Bassett, *Vertical Integration Revisited,* 19 J.L. & Econ. 17, 18-38 (1976); Note, *Refusals to Deal by Vertically Integrated Monopolists,* 87 Harv. L. Rev. 1720, 1725-30 (1974). Courts have sought to limit imposing liability upon newspapers which vertically integrate into distribution only to situations where one or more of these incentives are present. *See, e.g., Byars,* 609 F.2d at 861. *But cf.* P. Areeda, Antitrust Law ¶ 729.7d (Supp. 1982). In the present case, these circumstances do not exist. No price discrimination will result because the purpose of the delivery agent system was to establish a uniform retail price. Nor, as the district court found, will Star Co.'s forward integration raise barriers to first level entry (publication of daily metropolitan newspapers). The delivery agent contracts expressly allow the delivery agents to deliver for other newspapers as long as such delivery will not disrupt the delivery of Star Co. newspapers. Finally, no argument has been made that Star Co. has undertaken to distribute its own newspapers to avoid government regulation of its first level monopoly profits. *See* 695 F.2d at 341 (Henley, J., dissenting).

We are not unaware of certain record evidence of two possible anticompetitive effects of the delivery agent system: increased prices and reduced services. There is testimony which tends to show that Star Co. believed at the time of trial that it could not deliver newspapers more efficiently than the contract carriers and that any additional profits would have to come from increased revenues. Indeed, according to the panel majority, most Star Co. readers would pay more for their subscriptions under the announced delivery agent retail prices. *See* 695 F.2d at 330 & n. 10. While it may be true that many

readers initially will have to pay more for their subscriptions, it is also true that many readers will pay less. One of the legitimate business reasons advanced by Star Co. in support of the delivery agent system was the establishment of uniform rates and services for all subscribers, and the record indicates that Star Co.'s proposed uniform rates were lower than the rates charged by some independent contract carriers, although admittedly higher than others. Moreover, as the panel dissent pointed out, we are not told of the extent, if any, to which the price increases may be attributable to a general increase in costs unrelated to Star Co.'s decision to vertically integrate. *Id.* at 341 (Henley, J., dissenting) (general economic conditions as opposed to change in method of distribution).

Concededly, one procompetitive effect that can be eliminated when potential competition is removed from the distribution market is the downward pressure on price. Indeed, it is said that vertical integration frequently is followed by price increases. *See* McGee & Bassett, *Vertical Integration Revisited,* 19 J.L. & Econ. at 27 n. 28. And, even if Star Co. is able to achieve distribution economies by vertical integration, such savings may not result in lower retail prices. *See* Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics,* 27 Mercer L. Rev. 1061 (1976), *reprinted in* T. Calvani & J. Siegfried, Economic Analysis and Antitrust Law 20-26 (1979).

Indeed, a price increase is not necessarily inconsistent with the optimum monopoly price theory to the extent that Star Co.'s concern over its circulation and advertising revenue, the monopoly power of the contract carriers, and the individual contract carriers' ability to set varying retail prices may have combined to exert a retardant effect on Star Co.'s wholesale prices, thus robbing Star Co. of

its ability to reap the full monopoly profit at the wholesale level.

The monopoly power of the second level monopolist, here the individual contract carrier, is exaggerated by the nature of the newspaper industry. As has been noted, an important source of revenues for a newspaper is advertising revenues. Advertising rates are based on the number of subscriptions. The number of subscriptions is in part a function of price: the lower the retail price, the more subscriptions that are sold. When a contract carrier intends to raise its retail price, the newspaper is threatened with a loss of subscriptions caused by the increased prices. Moreover, the newspaper will not recoup any of the lost advertising revenues through increased sales revenues because the independent contract carrier receives 100% of the increase in the retail price. The newspaper is reluctant to raise its wholesale price to compensate for this loss because any increase in the wholesale price may trigger an additional retail price increase by the contract carrier who wants to maintain a certain level of profit. These conditions create an incentive for the newspaper to "share" even more of the monopoly profit with a contract carrier by lowering its wholesale price in order to head off a retail price increase by the contract carrier.

Even though Star Co. may theoretically possess the ability to set the retail price at the optimum monopoly price through its control of the wholesale price, in reality Star Co. probably does not have the information or the ability to analyze the information necessary to actually set the retail price at the optimum level. Depending on the subscription rates charged by each independent contract carrier, the actual retail price may be above or below the optimum monopoly price.

The panel majority felt that elimination of the contract carriers would decrease the range and quality of service provided to Star Co. readers. For example, delivery to country routes would be reduced from twice daily to once daily. Special services ordinarily provided by the contract carriers to suit individual needs of readers would be discontinued by delivery agents. Also, the range of subscription options collectively offered by the contract carriers in the Kansas City area would be reduced from ten options to three options under the delivery agent system. 695 F.2d at 330-31. However, the panel majority considered the services provided to Star Co. readers by contract carriers collectively. In reality, however, each contract carrier was itself a monopolist along its exclusive route. No contract carrier competed with any other contract carrier. *See* P. Areeda, Antitrust Law ¶ 729.7a, at 197 (Supp. 1982) (describing retail distributors of newspapers as "mini-monopolists"). Along any given route, the range of service options was not as great as that which existed in the collective market. Thus, to many individual readers, the range of services provided by delivery agents will be greater than what exists under the contract carrier system.

On balance, we agree with the panel dissent that appellees have not borne their burden as plaintiffs of proving that the procompetitive effects generated by optimum monopoly pricing and the unique nature of a newspaper's revenues are outweighed by the minimal anticompetitive effect of eliminating potential competition from the retail market. Moreover, we find it hard to ignore the fact that every other antitrust case brought against a newspaper publisher challenging the newspaper's decision to forwardly integrate into distribution has been resolved in favor of the newspaper. *See, e.g., White v.*

Hearst Corp., 669 F.2d 14 (1st Cir. 1982); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Byars*, 609 F.2d 843; *Hardin v. Houston Chronicle Publishing Co.*, 572 F.2d 1106 (5th Cir. 1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Grill v. Reno Newspapers*, 6 Media L. Rep. (BNA) 1818 (D. Nev. 1980); *Neugebauer v. A.S. Abell Co.*, 474 F. Supp. 1053 (D. Md. 1979); *Newberry v. Washington Post Co.*, 438 F. Supp. 470; *McGuire v. Times Mirror Co.*, 405 F. Supp. 57; *Lamarca v. Miami Herald Publishing Co.*, 395 F. Supp. 324. *Cf. Bunch v. Artec International Corp.*, 559 F. Supp. 961 (S.D. N.Y. 1983) (termination of dictaphone dealers). Again, we emphasize that there is nothing unlawful about the mere possession of monopoly power. Nor is it unlawful *per se* for a monopolist to unilaterally refuse to deal with a former distributor or to vertically integrate. However, a monopolist may be subject to antitrust liability if it misuses its monopoly power to accomplish a vertical integration and a refusal to deal that results in unreasonable anticompetitive effects. Each case must be resolved on its own particular facts. In this case appellees have failed to prove that any anticompetitive effects that might result from Star Co.'s vertical integration and refusal to deal are unreasonable. Accordingly, we reverse the judgment of the district court, dissolve the permanent injunction, and vacate the award of attorney fees.

HEANEY, Circuit Judge, with whom LAY, Chief Judge, and BRIGHT, Circuit Judge, join, dissenting.

I would adhere to the majority panel opinion and affirm the district court. *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982). This dissent is written to emphasize my reasons for believing that the Star vio-

lated Section 2 of the Sherman Act by refusing to deal with the 250 independent carriers.

At the outset, it is important to note that the en banc opinion is consistent with the panel opinion regarding several important factors, namely:

(1) That the Star could not deliver its newspapers more efficiently than the independent carriers.

(2) That the Star possesses monopoly power achieved in violation of the antitrust laws of the United States.

(3) That the Star does not have an unfettered right to vertically integrate its operation.

(4) That the elimination of the Star as a potential competitor to the 250 independent carriers will eliminate the beneficial competitive interaction between business entities in the retail market that the antitrust laws were enacted to preserve.

(5) That the central issue in the case is whether the Star's refusal to sell to independent carriers will result in unreasonable anticompetitive effects in the market or, to put it another way, whether the procompetitive effects are sufficient to overshadow the anticompetitive effects of removing the competition from the market, thus resulting in no unreasonable anticompetitive effects.

The majority finds that the carriers "have not borne their burden as plaintiffs of proving that the procompetitive effects generated by optimum monopoly pricing and the unique nature of a newspaper's revenues are outweighed by the anticompetitive effect of eliminating potential competition from the retail market." It appears to place primary reliance on the following conclusions in the original dissenting opinion to support this finding:

> (1) That while many readers will pay more for their subscriptions, many readers will pay less.

The fact is that 92% of the readers will pay more and only 8% pay less.

> (2) That the price increase may be attributable to a general increase in costs unrelated to the Star's decision to vertically integrate.

The fact is that the price comparison was made as of the date that the Star fixed to discontinue dealing with the 250 carriers. There is no evidence in the record that the new price schedule had any relationship to a general increase in costs. To the contrary, the evidence indicates that uniformly higher prices were to be put into effect to increase revenues and profits from circulation.

> (3) That the range of services provided to individual readers will be greater than what exists under the contract system.

There is no evidence in the record to support this statement. Rather, many of the divergent services that were being offered to residential, commercial, and rack subscribers were to be curtailed.

> (4) The Star's forward integration will not raise barriers to first level entry (publication of daily metropolitan newspapers).

This statement is factually true but it is irrelevant. The Star has already erected, by unlawful means, every barrier that is realistically necessary to prevent any informed potential competitor from entering the market.

The majority finds an additional reason to reverse the district court in "the fact that every other antitrust case brought against a newspaper publisher challenging

the newspaper's decision to forwardly integrate into distribution has been resolved in favor of the newspaper." Assuming without conceding the validity of this statement,[1] the facts are: (1) that this case is the only one in which the newspaper refusing to sell to independent distributors stood convicted of having achieved a monopoly in the newspaper publishing business in a relevant market by illegal means; and (2) that this case is the only one in which the plaintiffs proved that the new delivery system would not be more efficient than the old one, that

1. *White v. Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982), was brought under Section 1 of the Sherman Act and failed because plaintiffs failed to prove a conspiracy; in *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982), the independent distributors sought to raise their prices to distributors; *Hardin v. Houston Chronicle Publishing Co.*, 572 F.2d 1106 (5th Cir. 1978), involved only a denial of a preliminary injunction; in *Byars v. Bluff City News Co.*, 609 F.2d 843, 853 (6th Cir. 1980), the Court noted:

> If the court below does find that Bluff City possesses monopoly power, the record before us suggests that at worst, such power was thrust upon Bluff City by the national periodical distributors who, for valid business reasons, chose to deal only with it. This is significant because mere possession of monopoly power is not illegal. A monopolist which achieves that status because of "a superior product, business acumen, or historic accident," *United States v. Grinnell Corp.*, *supra*, 384 U.S. at 571, 86 S.Ct. at 1704, cannot be faulted. Such monopolists are "tolerated but not cherished" because of "considerations of fairness and the need to preserve proper economic incentives." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979). However, if a monopolist abuses its monopoly power and acts in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals, then § 2 is violated. If, after the additional fact-finding ordered on remand, the district court finds that Bluff City did in fact possess monopoly power, it must then determine whether Bluff City abused this power by refusing to deal with Byars. [Footnote omitted.];

in *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), no showing was made that the defendant was a monopolist; in *Neugebauer v. A. S. Abell Co.*, 474 F. Supp. 1053 (D. Md. 1979), there was neither a monopoly nor a refusal to deal; and in *McGuire v. Times Mirror Co.*, 405 F. Supp. 57 (C.D. Cal. 1975), the newspaper was not a monopoly.

prices to consumers would rise as a result of the takeover, and that the range of services would be narrower under the new system than the old.

What remains then to support the reversal of the district court is the theory developed by the "Chicago school" of economists that absent circumstances not present here, consumers are not harmed when a monopolist extends its monopoly forward into retail distribution—the reasoning being that inasmuch as the monopolist has the power to obtain maximum monopoly profits by charging as much as it chooses at the wholesale level, consumers will not be further harmed if the monopolist takes over distribution. Notwithstanding the Department of Justice's embrace of this theory, we should not be willing to substitute theory for hard evidence in the record. Here, the Star had been unable to maximize its profits under the independent distribution system. The reason is obvious. The Star could not, without violating antitrust laws, control the price at which the independent carriers sold the papers to consumers; and absent a uniform price, the pressure from those paying more than those in an adjacent territory would vent their displeasure on the Star. Thus, notwithstanding the "Chicago" theory, the independent distribution system of 250 carriers operated to hold down prices to the ultimate consumers, and to protect them from the full exercise of unlawfully achieved monopoly power.

One further point deserves emphasis. It was made by Chief Justice Warren in *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962):

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of

viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Here, we should, as Judge Bright points out in his dissent which I join, show concern for the 250 viable, small, locally owned businesses who are affected by the decision of the Star. For years, they have delivered the newspapers economically and efficiently. They have treated their customers fairly and have given them excellent service. Now they stand to lose their businesses simply because the Star, a highly profitable newspaper, wants to maximize their monopoly prices by establishing a uniformly higher retail price.

The views of Chief Justice Warren and his concurring colleagues in *Brown Shoe* are under assault by those who would destroy the effectiveness of our antitrust law. We should take this opportunity to repel that assault.

BRIGHT, Circuit Judge, with whom HEANEY, Circuit Judge, joins, dissenting.

The majority in this case, with some hesitation and a degree of uncertainty, permits a monopolist to destroy hundreds of independent businesses. What a sad day for the American ideal that permits every person on his or her own initiative to own and operate a small business.

A monopolist may, in some circumstances, justify the gobbling-up of independent enterprises, where the consumer will benefit and increased efficiencies or greater competition will result. But the record here reflects no such justification.

Congress enacted the antitrust laws "to promote competition through the protection of viable, small, locally owned businesses." *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962). The proposed action of the Kansas City Star, which the majority today approves, will destroy the currently independently owned distributorships. I would hold that a monopoly may not integrate vertically by refusing to deal further with its independent distributors unless that monopoly demonstrates that lower transactions costs or greater production economies will result. Any proposed integration must be "a good faith effort to do business in more efficient ways." *Auburn News Co., Inc. v. Providence Journal Co.,* 659 F.2d 273, 278 (1st Cir. 1981), *cert. denied,* 455 U.S. 921 (1982).

The record in this case fails to support the Star's claim that newspaper distribution would be more efficient were it to integrate vertically. The Star failed to establish that it would distribute its newspapers more economically than do the independent retailers. Any eventual enhancement of the Star's profits, then, would probably derive from price increases rather than from cost reductions. The Star has not shown justification for its proposed vertical integration of distribution.

I dissent. I would affirm the district court and save these independent distributorships.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

Gweldon Lee PASCHALL and All
Intervenors, Appellees,

v.

The KANSAS CITY STAR
COMPANY, Appellant.

No. 81-1963.

United States Court of Appeals,
Eighth Circuit.
Submitted March 10, 1982.
Decided Dec. 20, 1982.
Rehearing and Rehearing En Banc
Granted Feb. 1, 1983.

Before HEANEY, BRIGHT and HENLEY,* Circuit Judges.

HEANEY, Circuit Judge.

The Kansas City Star Company appeals from an order of the district court permanently enjoining it from refusing to sell its newspapers at wholesale rates to independent contract carriers. The district court held that the company's proposal to directly distribute its newspapers through its own delivery agents and to eliminate independent carriers violated Section 2 of the Sherman Act. We affirm.

*The Honorable J. SMITH HENLEY assumed senior status on June 1, 1982.

I.

BACKGROUND.

The Kansas City Star was founded in 1880 as an evening newspaper. It expanded in 1894 to include a Sunday morning edition, *The Sunday Star,* and again in 1901 to include a morning paper, *The Kansas City Times.* From 1905 until 1942, the *Star, Times* and *Sunday Star* competed primarily with the *Kansas City Post* and *Kansas City Journal.* The *Post* and the *Journal* merged in 1922, but went out of business in 1942. Since then, the *Star, Times* and *Sunday Star,* all published by The Kansas City Star Company (hereafter the Star), and all different editions of the same newspaper, have been the only daily metropolitan newspapers published in the Kansas City, Missouri, and Kansas City, Kansas, metropolitan area.

In 1955, the Star was convicted of attempted and actual monopolization in violation of the Sherman Act. *Kansas City Star Co. v. United States,* 240 F.2d 643 (8th Cir.1957). The conviction was based on the Star's predatory practices in driving its competitors out of business and preventing others from entering the Kansas City newspaper market.

Since nearly its inception, the Star's newspapers have been distributed by independent carriers who purchase papers from the publisher at a wholesale rate, and then resell and deliver them to subscribers. Each independent carrier serves an exclusive distribution area. Hence, the only competition an independent carrier faces is from the Star itself, which expressly reserves the right in its delivery contracts to directly sell and deliver its newspapers to anyone. In fact, however, the Star seldom directly delivers newspapers to customers. The district court found that actual competition between the Star and

the independent carriers was *de minimis*. It also found, however, that the Star's presence on the edge of the distribution market has a restraining effect on the retail prices set by independent carriers.

On May 24, 1974, the Star sent a letter to each independent carrier stating that the company might choose to modify or change its method of distribution, and declaring that it believed that it could do so without liability to the independent carriers. Beginning on June 1, 1974, the Star required any individual signing a new independent carrier contract to acknowledge in writing that he or she had read and understood the company's May 24, 1974, letter. These actions by the Star prompted plaintiff Gweldon Paschall to initiate this lawsuit in January, 1975, to determine whether such a change by the Star would violate the antitrust laws.

In fall, 1976, Capital Cities Communications, Inc., a New York-based communications conglomerate, made a $125 million tender offer to the Star's stockholders. On February 15, 1977, Capital Cities completed its acquisition of the Star. In analyzing the Star prior to purchase, Capital Cities' officers were concerned with the Star's low revenue per delivered copy, which was largely attributed to the Star's independent carrier distribution system.

In September, 1977, shortly after the Capital Cities' takeover, the Star announced its intention to change its distribution system. It proposed to terminate its existing contracts with independent carriers, and to replace them with its own agents who would directly sell and deliver papers to readers. No newspapers would be sold at wholesale to any independent carriers. As a result, the Star would have a monopoly in the retail, as well as publishing, market for daily metropolitan newspapers. The Star, however, offered all existing independent carriers the

opportunity to become delivery agents for the company. The agency agreements would enable the carriers to earn approximately the same income that they did under the existing system.

Plaintiff Paschall, joined by approximately 250 other carriers who had intervened as plaintiffs, moved for a temporary restraining order and preliminary injunction. On November 19, 1977, following an evidentiary hearing, the district court, the Honorable Elmo B. Hunter, issued a preliminary injunction barring implementation of the new distribution system.[1] The case was then assigned to the Honorable Warren K. Urbom to determine whether the Star had violated the antitrust laws. Following a nonjury trial, Judge Urbom found that the Star's proposal to discontinue wholesale vending of its papers to independent carriers constituted an illegal expansion of a monopoly under Section 2 of the Sherman Act. Following Judge Urbom's denial of a motion for reconsideration, Judge Hunter certified an interlocutory appeal. This Court initially granted leave to take the appeal, but subsequently vacated it as improvidently granted. *Paschall v. Kansas City Star Co.*, 605 F.2d 403 (8th Cir.1979). The case was remanded to the district court to determine if the plaintiff and intervenors had shown the requisite injury and causation to warrant relief. On remand, the district court, the Honorable William R. Collinson, found sufficient injury and causation, and entered a permanent injunction. The Star then appealed to this Court. The United States Justice Department filed a brief as *amicus curiae* arguing that the district court erred in finding a Sherman Act violation.

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1. Prior to the issuance of the preliminary injunction, the Star successfully replaced some of the independent carriers with delivery agents. The record does not reveal the number of delivery agents presently in place.

II.

LIABILITY.

The plaintiffs and intervenors (hereafter plaintiffs) do not challenge the Star's right to sell and deliver its own newspapers. They do contend, however, that the Star's proposed refusal to sell them papers at wholesale rates is an act of monopolization which violates Section 2 of the Sherman Act, 15 U.S.C. § 2. They argue that by so refusing to deal, the Star is unlawfully extending its monopoly in the publishing market to the presently competitive retail sale and delivery market.

A. *Monopolization.*

In order to establish monopolization in violation of Section 2, the plaintiffs here must prove that the defendant: (1) possessed monopoly power in the relevant market, and (2) used it, whether lawfully or unlawfully acquired, to foreclose competition, gain a competitive advantage, or destroy a competitor.[2] *Von Kalinowski, 3 Antitrust Laws and Trade Regulation,* § 8.02[1], at 5 (Cum.Supp.1981). *See United States v. Griffith Corp.,* 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948); *Berkey Photo, Inc. v. Eastman Kodak,* 603 F.2d 263, 275-276 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

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2. Such uses of monopoly power to restrict or eliminate competition or competitors permit an inference to be drawn of intent to monopolize, which Section 2 requires in actual monopolization cases. Specific intent to monopolize need not be established. The plaintiffs need only prove general intent, that is that the defendant intended to engage in the practices which reduced competition. *See Von Kalinowski, 3 Antitrust Laws and Trade Regulation,* § 8.02[4], at 8-41—8-64 (1982) (collected cases).

Our threshold inquiry then is whether the defendant enjoys a monopoly in the relevant market.[3] The Star does not dispute the district court's findings that the relevant product market is metropolitan daily newspapers sold at wholesale,[4] that the relevant geographical market is the seven-county metropolitan area of Kansas City, Missouri, and Kansas City, Kansas,[5] and that the defendant enjoys monopoly power in these markets. We agree that these findings are sound and, accordingly, affirm them.

The remaining question then is whether the Star, as a vertically integrated monopolist,[6] used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. *See supra*, at 326. Specifically, we must consider whether the Star's proposed

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3. The relevant market consists of two parts—the product market and the geographic market. The relevant product market consists of the goods and/or services with which defendant's product competes. The relevant geographic market is the geographic area of effective competition in which the defendant's product is traded. *Id.* at § 8.02[2], 8-8—8-30.

4. The district court concluded that other media—suburban newspapers, shoppers, handbills, news magazines, television and radio—are sufficiently different in purpose, content, technique and audience appeal to constitute a separate product market. Moreover, it determined that none of the other media alone or in combination are an adequate substitute for the metropolitan daily newspaper.

5. The district court based this finding on the fact that between eighty and eighty-four percent of the Star's newpapers are delivered to readers within those seven counties.

6. Vertical integration is the inclusion within a single firm of two or more stages in the production or distribution of an end product. A firm integrates "downstream" or "forward" when it undertakes further processing or distribution of a product that has been or could be sold to independent producers or distributors. The key difference between vertical integration by a competitive firm and vertical integration by a monopolist is that monopoly at one stage of the production-distribution process may carry with it the power to affect competition in earlier or later stages. Areeda & Turner, 3 *Antitrust Laws*, ¶¶ 723-725 (1978).

refusal to sell its newspapers at wholesale rates to independent carriers, which would give it a monopoly in the retail distribution of metropolitan daily newspapers, constitutes an unlawful abuse of its existing monopoly power in the publishing or wholesale market.

B. *Refusals to Deal.*

As a general rule, a company has a right to deal—or not to deal—with whomever it pleases, so long as the determination is made unilaterally.[7] *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919); *Byars v. Bluff City News Co.*, 609 F.2d 843, 854 (6th Cir.1979). A monopolist, however, has added obligations which impose upon it a duty to deal in some circumstances. *Byars v. Bluff City News Co., supra*, 609 F.2d at 854-855.

The Star seeks to refuse to deal with the independent carriers in order to integrate forward into the distribution of its newspapers. Such vertical integration by a monopolist may have either pro- or anticompetitive effects. *See infra*, at 328. *See also Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Thus, a refusal to deal designed to accomplish vertical integration, without more, does not violate the Sherman Act. *Id.* at 278; *Byars v. Bluff City News Co., supra*, 609 F.2d at 851. *See United States v. Columbia Steel Co.*, 334 U.S. 495, 525-526, 68 S.Ct. 1107, 1123, 92 L.Ed. 1533 (1948). Rather, the extent of permissible vertical integration must be governed by the facts and circumstances of each indi-

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7. Concerted refusals to deal, of course, are generally *per se* violative of Section 1 of the Sherman Act. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); Sullivan *Antitrust* §§ 83 *et seq.* (1977).

vidual case. Here, the Star's proposal to refuse to deal with the independent carriers and, instead, to deliver its own newspapers violates Section 2 of the Sherman Act only if the plaintiffs established that such vertical integration will result in substantial anticompetitive effects that are not offset by production economies, savings in market transaction costs, or other competitive benefits. *See Auburn News Co. v. Providence Journal Co., supra,* 659 F.2d at 278; *Byars v. Bluff City News Co., supra,* 609 F.2d at 859-863.[8] On the record here, we hold that the plaintiffs have established that the Star's proposed refusal to deal violates the Sherman Act.

The Star, joined by the United States Justice Department as *amicus curiae,* contends that, as a matter of law, the company's refusal to deal is not unlawful because economic theory shows that it will produce pro-competitive rather than anticompetitive results. They theorize as follows: Under any given cost and demand conditions, there is a single price which will maximize a monopolist's profit. If the monopolist charges more than the "profit-maximizing" price, its profit will be less than optimal because the decrease in revenue from reduced sales, due to the higher price, will exceed the increase in revenue from the higher price. Moreover, a monopolist can ex-

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8. Both *Auburn News Co. v. Providence Journal Co.,* 659 F.2d 273 (1st Cir.1981), *cert. denied,* 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982), and *Byars v. Bluff City News Co.,* 609 F.2d 843 (6th Cir.1979), involved challenges by independent newspaper carriers to the decisions by alleged monopoly newspapers to directly deliver their own product and to eliminate independent carriers. In *Auburn News Co. v. Providence Journal Co., supra,* 659 F.2d at 278, the Court found no Sherman Act violation because the refusal to deal did not reduce competition in the delivery market. In *Byars v. Bluff City News Co., supra,* 609 F.2d at 864, the Court remanded the matter to the district court to determine whether the newspaper enjoyed a monopoly in the relevant market.

tract its maximum monopoly profit only once from the sale of any given end product. If a monopolist attempts to increase that profit by integrating forward and charging a higher retail price, it will be unsuccessful because, again, the decline in revenue from the decreased demand will exceed the increase from the higher price. Consequently, a monopolist cannot increase its profits by integrating forward unless it can directly distribute its product at a lower cost than the independent distributors. *See, e.g.*, Areeda & Turner, 3 *Antitrust Laws*, ¶¶ 725-726 (1978); Posner, *Antitrust Cases, Economic Notes and Other Materials*, 704-708 (1974); Bork, *The Antitrust Paradox*, 242-243 (1973).

The Star and *amicus* urge that the Star's decision to integrate forward shows that it can distribute its newspapers more efficiently than the independent carriers. They claim, therefore, that the Star's proposed action does not violate Section 2 because it will result in lower prices and better service for consumers, and lower costs and increased sales for the Star.

The analysis advanced by the Star and the *amicus*, while plausible, is incomplete. The commentators they rely upon recognize that vertical integration by a firm with monopoly power may also produce anticompetitive effects. It may permit price and service discrimination between consumers, increase barriers to entry at the first level, facilitate evasion of government regulation of monopoly profits at the first level, or otherwise enable the monopolist to more fully exploit its dominant first-level market power.[9] *See, e.g.*, Areeda & Turner, 3 *Antitrust*

9. The Star and *amicus* concede that these anti-competitive effects of vertical integration are theoretically possible but they contend that none are produced by the Star's decision to exclusively sell and deliver its own newspapers. The record does not support this contention. *See infra*, at 329-332.

Laws, supra, at ¶¶ 725-726; A. Neale, *The Antitrust Laws of the United States of America,* 127-133 (2d ed. 1970); Note, *Refusals to Deal by Vertically Integrated Monopolists,* 87 Harv.L.Rev. 1720, 1727-1730 (1974).

Moreover, even though vertical integration by a monopolist might theoretically lead to pro-competitive results, some commentators have suggested that it nonetheless may be beneficial to preserve competition at the retail level because competitors are often more efficient or innovative than monopolists. *See, e.g.,* Sullivan, *Antitrust,* 129 (1977); Areeda, *Antitrust Analysis, Problems, Text, Cases,* ¶ 610, at 522 (1967); Note, *Refusals to Deal by Vertically Integrated Monopolists, supra,* 87 Harv.L. Rev. at 1730 & n. 62. In fact, there is empirical evidence showing that the lack of competition may produce adverse effects on cost and progressiveness. F.M. Scherer, *Industrial Market Structure and Economic Performance,* 407-438 (2d ed. 1980).

Since this case cannot be resolved by resorting to economic theory alone, we turn to the factual evidence. The Star and *amicus* contend that the company's proposed forward integration will in fact result in more efficient distribution, lower retail prices and better customer service. The record does not support these claims. Rather, it shows that the anticompetitive consequences of the Star's proposed refusal to deal will likely outweigh any competitive benefits. The refusal will eliminate the Star as a potential competitor in the retail market, will likely result in higher prices and poorer services to readers, and will not lead to a more efficient delivery system.

The preservation of potential competition in concentrated markets is an important goal of antitrust policy. *See, e.g., United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974); *United*

States v. Falstaff Brewing Co., 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973); *FTC v. Proctor & Gamble Co.,* 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967); *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). The potential competition doctrine's rationale is that the threat of entry by a firm standing at the threshold of a market will likely exercise a restraining influence on pricing and other behavior of existing firms in the market, and that the removal of the threat will adversely affect competition. *See Von Kalinowski,* 4 *Antitrust Laws and Trade Regulations, supra,* § 19.02[2], at 19-50.9—19-55.

The doctrine is applicable when a potential competitor is positioned on the edge of the market so that existing firms reasonably consider it a potential entrant into the market. *See United States v. Falstaff Brewing Co., supra,* 410 U.S. at 532-533, 93 S.Ct. at 1100-1101. The district court found that the independent carriers reasonably believed that the Star was a potential competitor in the distribution market, that the Star's position on the edge of the market had a retardant effect on retail prices, and that the Star's refusal to sell to the independent carriers would eliminate this retardant effect. There is ample evidence to support these findings.

The independent carrier contracts explicitly permitted the Star to sell newspapers directly to readers within each carrier's territory, allowed the Star to cancel a carrier's contract on four days notice, and required each carrier to maintain for the company a complete list of customers and their addresses. The Star has exercised its contractual right to cancel as a result of a carrier's unsatisfactory performance. Moreover, on one occasion in 1970, the Star, at the request of subscribers, commenced direct delivery to a group of customers at an apartment

complex in response to a price increase by an independent carrier. In another instance, in 1974, the Star published in its papers "a note to our readers" that informed them that certain increases in home delivery subscription rates were the result of price increases by independent carriers, not the publisher. The Star concedes that it wanted the independent carriers to set retail prices as low as possible so that circulation, and ultimately advertising revenues, would not decrease due to high prices.

Thus, the Star is plainly positioned on the threshold of the retail market. Moreover, it has communicated to the independent carriers its position as a potential entrant. In May, 1974, the Star wrote to all independent carriers, announcing that "[w]hile it is certainly not now anticipated, it should be recognized that in the future the Star can and may choose to modify or change its circulation system or practices without liability to independent contract carriers." Within a week thereafter, it requested an up-to-date list of all subscribers and two months later, a follow-up request was made. The Star informed the carriers that if they did not provide the information by August 24, 1974, they would be terminated. In March, 1977, shortly after Capital Cities' purchase of the Star, the company again requested an up-to-date subscriber list, and followed up this request by letter of April 11, 1977.

The foregoing evidence establishes that the Star took action to show the independent carriers that the company was prepared to enter the delivery market if they did not keep retail prices down. There can be no doubt on this record that the independent carriers were acutely aware of the Star's presence on the edge of the market, and that they made their pricing and service decisions accordingly. The Star's proposal to directly deliver its newspapers and to eliminate independent carriers would

destroy the competitive influence it exerts as a potential entrant into the retail market.

In fact, the anticompetitive effects of the loss of the Star as a potential competitor have already begun to appear. In areas where the Star has implemented direct delivery, many customers are already paying higher retail prices. Prior to the Star's announcement of the change in the delivery system, independent carriers had been charging monthly rates ranging from $3.50 to $6.00 for a full subscription, and from $2.85 to $5.85 for a split subscription. When the Star announced the delivery system change, it also publicized its intention to charge a uniform delivery rate, which would be $6.00 per month for a full subscription and $5.00 per month for a split subscription, effective December 1, 1977. While the Star's proposed rates were lower than some of the independent carriers' prices, the implementation of those uniform rates would have resulted in a price increase for most subscribers. Indeed, the record shows that if the Star had implemented its proposed delivery system and uniform rates in December, 1977, 149,728 readers with full subscriptions would have faced price increases, while only 5,990 full subscribers would have had their rates decreased.[10] The number of split subscription readers that

10. The independent carriers were asked how many subscribers they served and what price they charged at the time the Star announced its proposal to change delivery systems. Two hundred and forty-eight carriers responded, providing the following information:

Full Subscription

Price	No. of Subscribers
$3.00 - $3.99	854
$4.00 - $4.99	25,485
$5.00 - $5.99	123,389
$6.00	29,285
Over $6.00	5,990

(Continued on following page)

would have faced rate increases under the Star's proposal also exceeded the number that would have paid lower prices.[11] In areas where the Star has replaced independent carriers with delivery agents, many readers are in fact now paying more for their newspapers than they did under the old system. Indeed, at trial, the Star's circulation manager conceded that the price increases have contributed to decreased circulation on some routes.

The Star's efforts to eliminate independent carriers have also resulted in decreased consumer services. The Star publishes twelve or thirteen issues per week. Not all customers want to receive every issue. To satisfy

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Footnote continued—

Split Subscription

Price	No. of Subscribers
Under $3.00	301
$3.00 - $3.99	3,677
$4.00 - $4.99	7,905
$5.00	2,474
$5.01 - $5.99	7,029
Over $6.00	49

Several of the 248 carriers reported their subscription prices but not the number of subscribers they served:

Full Subscription

Price	No. of Carriers
$4.00 - $4.99	4
$5.00 - $5.99	13
$6.00	3

Split Subscription

Price	No. of Carriers
Under $3.00	1
$3.00 - $3.99	3
$4.00 - $4.99	8
$5.00	2
$5.00 - $5.99	13

11. *Id.*

the differing needs of customers on their routes, the independent carriers collectively offer ten different types of split subscriptions, various billing and credit arrangements, and other customer services. Independent carriers also provide service by delivering to racks and to commercial establishments, and by altering their deliveries to these vendors according to vacations, holidays and seasonal variations. Under the existing system, the Star is free to offer another option to anyone dissatisfied with the service provided by his or her carrier. If the independent carriers are eliminated, however, consumers will have only the limited subscription, billing and other services offered by the Star. Any personalized or alternative options provided by independent carriers will be eliminated. Indeed, the Star has already reduced services in certain areas where it placed delivery agents before the district court's order. For example, all delivery agents and independent carriers deliver their newspapers to "city" routes twice per day. Independent carriers with "country" routes also generally deliver the papers both in the morning and in the evening. The Star's agents, however, distribute the newspapers only once a day in "country" routes where they have replaced independent carriers. The Star's justification, according to its circulation manager, is that "we cannot possibly economically deliver it [twice per day] on certain country routes at this particular time."

In addition, the record is devoid of evidence indicating that the Star can deliver its newspapers more efficiently than the independent carriers. In fact, the evidence indicates that the Star intends to increase its profits by increasing retail prices and eliminating the independent carriers' profits rather than reducing delivery costs or increasing circulation through lower prices and/

or better services.[12] In this regard, the statements of Capital Cities' officials and employees prior to the purchase of the Star in 1977 are particularly significant. For example, a March 29, 1977, report prepared by John Morton, a securities analyst employed by Capital Cities, stated:

> The two Kansas City newspapers labor under an unwieldy system of distribution by independent distributors, a system that returns to the newspaper far less revenue per copy than most newspapers enjoy, and the papers in recent years have operated with relatively low margins considering their dominance in the market.
>
> * * *
>
> There are several aspects of the Kansas City papers that we believe offer Capital Cities considerable opportunity for improvement. The cumbersome distribution system, under which control of prices rests with independent distributors, provides the newspapers with little more than half the circulation rev-

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12. The defendant's motivation is relevant because it may reveal the absence or secondary importance of socially beneficial reasons for a vertically integrated monopolist's refusal to deal. Note, *Refusals to Deal by Vertically Integrated Monopolists,* 87 Harv.L.Rev. 1720, 1724 (1979). The district court, while holding the Star's action unlawful, did agree that the company had certain legitimate business reasons for its refusal to deal. It found:

> The new system would give the company control over pricing to the subscriber, thereby being able to advertise subscription prices, which is quite impossible where carriers largely determine the ultimate specific prices. It would permit the company to assure more rapid "starts" for new subscribers, and would allow uniform policy regarding time of collection, manner of payment by customers, and method of responding to customer complaints, all of which have been problems under the independent contract carrier system.

These findings are not clearly erroneous; however, they do not fully summarize the evidence concerning the Star's reasons for proposing to eliminate the independent carriers. *See infra,* at 331-332.

enue than might reasonably be expected from the papers' price. There are lawsuits pending in connection with the distribution setup, and Capital Cities' management declines to comment on what its plans might be. However, it would appear reasonable to expect management to move toward gaining control of distribution along the lines followed by The Los Angeles Times, The Washington Post, and other newspapers that previously had independent distributors. Lawsuits attempting to thwart company takeover of distribution in these markets have resulted in Court decisions in favor of the companies.

At trial, Morton testified that Capital Cities hoped to improve the low circulation revenues by gaining control of the delivery system. He stated:

A. * * * I do recall at the meeting [of Capital Cities' executives which Morton attended] there was talk of the fact that the revenue per copy was low by industry standards and that they hoped to improve it. There was also talk at some point in the meeting that they hoped to go from independent delivery— they hoped to gain control of the distribution of the newspaper, in other words, as other newspapers were doing at that time.

Q. I think you started to say, "[t]hey hoped to go from independent something to—"

A. Well, to some kind of a system where they would have control over distribution of the newspaper —*the pricing in particular*. [Emphasis added.]

Jim Hale, current president of the Star, prepared a report, dated November 29, 1976, for Capital Cities' president Daniel Burke, which analyzed the Star's operation,

including the circulation department and the independent carrier distribution system. Hale stated:

> In synopsis, it is my conclusion that *it will be very difficult to effect major economies in the operation of the Star, and virtually all the profits that we expect to produce there would have to come from additional revenue.* [Emphasis added.]

Thomas Murphy, chairman of the board and chief executive officer of Capital Cities, penciled the note "key to everything" next to the part of Jim Hale's report discussing the publisher's low circulation revenues. At trial, Murphy testified that he expected the Star's revenues from circulation to be increased. He further testified that:

> A. To my knowledge, no decision was made [prior to Capital Cities' purchase of the Star to alter the delivery system].
>
> Q. No decision was made but were there discussions concerning that possible change?
>
> A. As I recall, the only thing—the distribution setup at the Kansas City Star was very unusual, and was not typical of most of the industry. And we certainly would hope over a period of time we could bring it closer to the other type operations that operated more successfully throughout the country.

The testimony of plaintiffs' expert witness, Dr. Frederick Kirby, an economist, corroborates the foregoing statements by the Capital Cities' personnel. Dr. Kirby testified that the $125 million purchase price paid by Capital Cities for the Star could not be justified by the newspaper's existing assets, its past profits, or the pre-

vious return on equity enjoyed by Capital Cities' shareholders. He concluded, therefore, that the Star would have to increase its profit level to justify the purchase price. And, Dr. Kirby, like James Hale in his report to Capital Cities, *supra,* at 331, concluded that the Star likely could only improve its profit by increasing revenue rather than reducing costs. He stated:

> There is no economic reason to believe that the Kansas City Star Company will be able to affect distribution of the newspapers more economically than is done by independent businessmen. Therefore, if they incur the same costs as the independent businessmen, then there would be no direct cost savings.

Finally, Dr. Kirby observed that direct delivery would give the Star "maximum control of price," and consequently enable it to increase revenue from both circulation and advertising.

Congress enacted the antitrust laws "to promote competition through the protection of viable, small, locally owned businesses." *Brown Shoe Co. v. United States,* 370 U.S. 294, 344, 82 S.Ct. 1502, 1534, 8 L.Ed.2d 510 (1962). The record here establishes that the Star's proposed action will destroy the present independently owned distributorships, and eliminate any actual and potential competition in the Kansas City retail newspaper market. Moreover, the evidence discussed above shows that the Star's proposed refusal to deal will produce anticompetitive effects on retail prices and services without accomplishing any savings in market transaction costs or creating production economies. The economic theory advanced by the Star and *amicus,* standing alone without factual support in the record, is insufficient to rebut that evidence. Therefore, the district court did not err in finding that the

Star's proposed refusal to deal with the independent carriers violates Section 2 of the Sherman Act.

In a number of recent cases, courts have rejected antitrust challenges by former independent distributors to publishers' decisions to vertically integrate into the delivery market. Notwithstanding the record evidence here of the anticompetitive impact and intent of its proposed refusal to deal, the Star contends that these cases compel a reversal of the district court. We disagree.

Some of the cases are inapposite because the alleged unlawful conduct was not the publisher's refusal to deal. For example, in *Newberry v. Washington Post Co.*, 438 F.Supp. 470 (D.D.C.1977), and *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir.1976), *cert. denied,* 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977), the plaintiffs alleged that the publishers and cooperating carriers had unlawfully combined to restrain prices and sales territories. In *Neugebauer v. A.S. Abell Co.*, 474 F.Supp. 1053 (D.Md.1979), the publisher did not refuse to deal with the independent carriers. The plaintiffs, nonetheless, alleged the publisher violated the antitrust laws by increasing the wholesale price of its papers while at the same time expanding its direct distribution activities. The court held that the plaintiffs failed to prove that the defendant had a monopoly in the relevant market and added that, in any event, the publisher's decision to compete with independent carriers was lawful, absent proof of predatory tactics. *Id.* at 1066-1069.

Other cases relied on by the Star are distinguishable from the instant one, not because of the legal theories employed by the carriers, but rather because of their factual bases. In several of the cases, the defendant apparently did not possess monopoly power in the rel-

evant market.[13] Consequently, those cases did not involve a monopolist using its dominant market power at one level to eliminate competition and obtain monopoly power at another. It is clear that a monopolist is prohibited from engaging in certain conduct that would be lawful if performed by a competitive firm. *See Berkey Photo, Inc. v. Eastman Kodak Co., supra,* 603 F.2d at 274-275.

Finally regardless of whether the newspapers enjoyed monopoly power in these refusal to deal cases, *see supra,* at note 13, they are not inconsistent with the district court's judgment here. In each case, the court premised its decision on the finding that the plaintiffs failed to prove that the change in delivery system would produce anticompetitive results.[14] Indeed, each court found that the converse would be true. Accordingly, each gave great weight to the publisher's claim that it was integrating forward because it could deliver the papers more efficiently

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13. *See Hardin v. Houston Chronicle Publishing Co.,* 434 F.Supp. 54 (S.D.Tex.1977), *aff'd,* 572 F.2d 1106 (5th Cir.1978) (per curiam); *McGuire v. Times Mirror Co.,* 405 F.Supp. 57 (C.D.Cal.1975); *Lamarca v. Miami Herald Publishing Co.,* 395 F.Supp. 324 (S.D.Fla.), *aff'd without opinion,* 524 F.2d 1230 (5th Cir.1975).

Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir.1976), and *Neugebauer v. A.S. Abell Co.,* 474 F.Supp. 1053 (D.Md.1979), are both distinguishable from this case because the defendants did not possess monopoly power in the relevant market, as well as because the plaintiffs did not utilize refusal to deal theories.

14. None of the cases relied on by the Star held that vertical integration by a newspaper publisher into the delivery market is lawful regardless of its competitive consequences. Indeed, they suggest quite the contrary. For example, in *Hardin v. Houston Chronicle Publishing Co., supra,* 434 F.Supp. at 57, the court stated: "[t]he change in the method of distribution does not violate the antitrust laws. The new distribution system will not have any anticompetitive effects." The First Circuit in *Auburn News Co. v. Providence Journal Co., supra,* 659 F.2d at 278, also indicated that the publisher's vertical integration would violate the Sherman Act if it had "adverse consequences on competition." The clear implication of the other decision relied on by the Star is the same. *See, supra,* at note 13.

than independent distributors and it desired to increase circulation by reducing prices and increasing services.

In contrast, here the plaintiffs have shown that the Star's refusal to sell its papers to the independent carriers will have an anticompetitive effect. Accordingly, the district court did not err in finding that the Star's proposed refusal to deal with the independent carriers violates Section 2 of the Sherman Act. None of the cases cited by the Star requires us to reach a contrary conclusion.

III.

STANDING.

When this case came before this Court in 1979, we remanded for a determination of the "threshold question * * * [of] whether or not the injury to plaintiffs' businesses that will result to plaintiffs upon termination of the independent distributorship contracts, is a potential injury sufficient to satisfy the first element of a private cause of action [under Section 16 of the Clayton Act, 15 U.S.C. § 26]."[15] *Paschall v. Kansas City Star Co., supra,* 605 F.2d 409. The district court found that the plaintiffs would be damaged as a result of the Star's refusal to deal with them. We agree.

The Star advances two theories why its proposed refusal to deal will not cause plaintiffs "loss or damage" within the meaning of 15 U.S.C. § 26. It first contends that the plaintiffs would not be damaged because it has offered them an opportunity to become delivery agents for the company. Although the record shows that the plaintiffs would most likely receive approximately the

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15. The Clayton Act, 15 U.S.C. § 26, authorizes a private cause of action for injunctive relief against "threatened loss or damage by a violation of the antitrust laws * * *."

same income as delivery agents as they have as independent carriers, this argument remains unpersuasive. Under the existing system of distribution by independent carriers, the plaintiffs own their own routes and can freely transfer or sell them.[16] Consequently, as the district court found and the record establishes, the plaintiffs' routes have significant market value. Indeed, current Star president, James Hale, in his report to the Capital Cities' president prior to the conglomerate's purchase of the newspaper, stated, "[t]he Star does not recognize carrier's proprietary rights but in spite of this, routes are sold at very high figures, ranging up to $200-300,000."

In contrast, under the proposed new system, the routes would be owned by the Star rather than the carriers; would be for a definite term and terminable in the event of a number of contingencies; and could not be transferred, assigned or sold. Therefore, the new routes would have little, if any, market value to the plaintiffs. This loss in market value plainly is a sufficient showing of damage to the plaintiffs which would result from the proposed change in the Star's delivery system.

The Star, nonetheless, claims that the plaintiffs will not be damaged by the change because, under the new delivery system, they retain the right to distribute other publishers' products. This argument also fails to convince us that the district court erred. As a practical matter, because the Star has a monopoly in the metropolitan daily newspaper market—which it unlawfully attained—the plaintiffs have no adequate substitute for defendant's product. Hence, the plaintiffs' businesses would be less

16. Although under the existing system any change of carriers is subject to the Star's approval, the company concedes that it has regularly approved such changes. Appellees Br. at 38-39, n. 34.

attractive under the new system than the existing one. Moreover, as a legal matter, the fact that the plaintiffs might have other product lines available or other means to generate income does not absolve the Star of antitrust liability for its refusal to deal. *See Trabert & Hoeffer, Inc. v. Piagel Watch Co.,* 633 F.2d 477, 482-483 (7th Cir. 1980).

Thus, we hold that the plaintiffs have established that the Star's refusal to sell newspapers to them will cause them "loss or damage" within the meaning of 15 U.S.C. § 26. Consequently, they have standing to pursue their claim.

IV.

INJUNCTIVE RELIEF.

The Star next contends that the permanent injunction entered by the district court must be vacated because it is overbroad. It argues that by ordering relief beyond requiring the Star to sell newspapers to independent carriers at wholesale rates, the district court unnecessarily intruded into its business operations. There is no merit to these contentions.

The district court has both the duty and the authority to fashion relief that terminates the illegal acts of monopolization, that ensures that they do not recur and that eliminates their consequences. *See National Society of Professional Engineers v. United States,* 435 U.S. 679, 697, 98 S.Ct. 1355, 1368, 55 L.Ed.2d 637 (1978); *United States v. United Shoe Machinery Corp.,* 391 U.S. 244, 250, 88 S.Ct. 1496, 1500, 20 L.Ed.2d 562 (1968). Moreover, district courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case."

International Salt Co. v. United States, 332 U.S. 392, 400-401, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947).

Here, the district court faced a situation where the Star is the sole source of metropolitan daily newspapers. Accordingly, it controls the price and supply of its product. The Star already has unlawfully attempted to eliminate the independent carriers as competitors in the retail market. It likely will continue to compete with the independen carriers in the retail market. In this hostile environment, a simple mandate directing the Star to sell its newspapers to independent carriers at wholesale rates very likely would not preserve competition as the Sherman Act requires.

Therefore, the district court entered a broader, permanent injunction. It, of course, ordered the Star to sell its newspapers at wholesale to independent carriers. In addition, it enjoined the defendant from terminating any existing delivery agreements with the plaintiffs except for a material breach of contract. Finally, the district court ordered that if the Star proposes to terminate any independent carrier, it must give him or her written notice of the alleged breach of contract and ten days to comply with the contractual terms without the penalty of termination. If termination becomes necessary, the defendant must allow the carrier twenty days after the written notice to secure a successor, subject to the Star's approval, which must be given or withheld according to the standards that now prevail.

In light of all the circumstances present here, we cannot say that the relief fashioned by the district court is improper. The district court explicitly provided that its injunction does not "prohibit the defendant from exer-

cising its right to compete with plaintiff and intervenors by sellings its newspapers at retail to home subscribers and other customers." Moreover, commentators have recognized that because a monopolist can evade its duty to deal by offering to do business only on unreasonable terms, a court must supervise the price and other terms of dealing to ensure that its decree is effective. *See* Areeda & Turner, 3 *Antitrust Law, supra* at ¶ 729; Note, *Refusals to Deal by Vertically Integrated Monopolists, supra,* 87 Harv.L.Rev. at 1754-1760. The district court's order here is no broader than necessary to provide sufficient supervision to effectively enforce its decree.

The Star, nonetheless, argues that because the order includes provisions to enforce the duty to deal imposed by the district court, it is improper. This argument is simply untenable. The Supreme Court has consistently recognized that "[t]he purpose of relief in an antitrust case is 'so far as practicable, (to) cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Group Limited,* 410 U.S. 52, 64, 93 S.Ct. 861, 868, 35 L.Ed.2d 104 (1973), *quoting United States v. United States Gypsum Co.,* 340 U.S. 76, 89, 71 S.Ct. 160, 169, 95 L.Ed. 89 (1950). Moreover, in *Otter Tail Power Co. v. United States,* 410 U.S. 366, 381-382, 93 S.Ct. 1022, 1031-1032, 35 L.Ed.2d 359 (1973), the Supreme Court required a vertically integrated monopolist to deal with second-level competitors. The Court obviously was aware that the duty to deal would require supervision; nonetheless, it did not decline to impose that duty. Nor do we in this case. As the *Otter Tail Power* Court stated, "those caught violating the Act must expect some fencing in." *Id.* at 381, 93 S.Ct. at 1031 (citations omitted).

V.

AWARD FOR ATTORNEYS' FEES AND COSTS.

After a hearing, the district court awarded the plaintiffs \$2.5 million[17] in attorneys' fees, apportioned as follows:

1. Base fee for time expended after the Star's September 24, 1977, proposed refusal to deal:	\$1,045,468.12
2. Base fee for time expended prior to September 24, 1977:	\$ 56,603.12
3. Bonus for risk and quality of representation:	\$1,102,071.24
4. Paralegal and law clerk time, and fee application:	\$ 129,414.37
5. Premium:	\$ 166,443.15

The district court also awarded the plaintiff \$342,399.42 in costs: \$34,407.14 in stipulated items, plus \$307,932.28 for expert witness fees. The Star challenges the district court's award on several grounds.

A. *Attorneys' Fees Incurred Prior to September 24, 1977.*

The Star first contends that none of the time expended by plaintiffs' counsel prior to September 24, 1977—the date the defendant announced its proposal to

17. This \$2.5 million award was for the services provided by the law firm of Morris, Larson, King, Stamper & Bold (Morris firm) which represented virtually all of the independent carriers in this case. The district court also granted fee awards of \$1,830 and \$1,500 to two other law firms, each of which nominally represented two carriers. The Star does not challenge the latter two awards on appeal.

change distribution systems—should be included in the attorneys' fee award. The district court rejected the Star's claim.

It is true, as the Star contends, that the defendant did not announce its intention to abandon the independent carrier delivery system until September 24, 1977, and that this proposed action constituted the Sherman Act violation against which the district court entered a permanent injunction. Nonetheless, plaintiff Paschall initiated this action in January, 1975, after the following series of acts taken by the Star: In March, 1974, the Star amended its distribution contracts to change wholesale prices from a fixed rate to one based on a percentage of each individual carrier's retail price. Two months later, on May 24, the Star sent a letter to each independent carrier stating that the carriers had no vested property interest in their routes, and declaring that the company could alter its distribution system without liability to them. Shortly thereafter, the Star requested an up-to-date list of subscribers from each independent carrier. Beginning on June 1, the Star required any individual signing a new independent carrier contract to acknowledge in writing that he or she had read and understood the company's May 24 letter.

These events precipitated Paschall's 1975 complaint, which included the Sherman Act claim upon which the Star's liability ultimately was based. Moreover, the acts taken by the Star in 1974 were part of a pattern of conduct in which it demonstrated that it was a potential entrant into the retail market. The Star's antitrust liability here is based, in part, on this potential entrant status. Finally, attorneys for the plaintiffs testified that they spent considerable time prior to 1977 investigating the newspaper business in general and the Star in particular, including, of course, its relationship with its independent

carriers. The plaintiffs used the information gained in those pre-1977 investigations to press their case for injunctive relief after the Star announced the proposed change in delivery systems.

Accordingly, we believe that the time expended by plaintiffs' attorneys prior to September 24, 1977, was sufficiently related to their subsequent efforts to gain injunctive relief to justify the district court's decision. Thus, it did not err in awarding attorneys' fees to plaintiffs for work done prior to September 24, 1977.

B. *Risk and Quality Bonus.*

The Star next contends that the district court erred by adding a bonus to the attorneys' fee award beyond the base fee or "lodestar" amount.

In *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1312-1313 (8th Cir.1981), this Court noted that the factors to be considered in determining attorneys' fees are:

> a) the number of hours spent in various legal activities by the individual attorneys,
>
> b) the *reasonable* hourly rate for the *individual attorneys*,
>
> c) the contingent nature of success, and
>
> d) the quality of the attorneys' work. [Emphasis in original.]

The starting point in determining attorneys' fees is to calculate a base or "lodestar" figure by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Id.* at 1312. The parties stipulated that the reasonable hourly rates for the individual attorneys were the Morris firm's current hourly fees, and the defendant

does not challenge the district court's determination of the number of hours spent by plaintiffs' attorneys.[18] The issue on appeal is whether the district court erred in doubling the lodestar figure of $1,102,071.24 (the stipulated upon $1,045,468.12, plus $56,603.12 for pre-September 24, 1977, work) on the basis of the risk (contingency) and quality of the work by plaintiffs' attorneys.

The district court is vested with significant discretion in determining a "reasonable fee." *E.g., International Travel Arrangers, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255, 1274 (8th Cir.), *cert. denied,* 449 U.S. 1063, 101 S.Ct. 787, 66 L.Ed.2d 605 (1980). Nonetheless, we must find an award improper if "the district court's findings were clearly erroneous as to the factual basis for the award, or * * * it committed abuse as to the discretional margin involved in its allowance." *Id.*

This Court has recognized that "the moving party must bear a heavy burden in proving the entitlement to an increase for risk or quality * * *." *Jorstad v. IDS Realty Trust, supra,* 643 F.2d at 1314. As the *Jorstad* Court noted, an increase is designed to take account of an unusual degree of risk or skill; it is a bonus that "reflects exceptional services only." *Id., quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 118 (3d Cir.1976). In addition, this Court has frequently cautioned against "over-generosity" caused by the use of high multiples of lodestar figure.

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18. The parties, of course, stipulated to the base attorneys' fee for time expended after September 24, 1977. The Star also does not challenge the district court's determination of the appropriate attorney time expended or hourly rates for the period before that date. Instead, the Star contends that the plaintiffs are entitled to no compensation for attorneys' fees prior to September 24, 1977, because that work was for matters independent from the instant action. We have already rejected this contention.

See, e.g., Jorstad v. IDS Realty Trust, supra, 643 F.2d at 1314; *International Travel Arrangers, Inc. v. Western Airlines, Inc., supra,* 623 F.2d at 1274. Because the plaintiffs did not meet their burden, we find that the district court abused its discretion in awarding any bonus for risk or quality of representation.

First, the increase awarded represents a doubling of a substantial lodestar amount. This lodestar figure already provides compensation for the length and complexity of the litigation because it included more than 11,000 hours in attorney time that extended as far back as 1973. Moreover, the stipulated hourly rates used to calculate the base fee were the Morris firm's current rates—which are among the highest in the Kansas City area. These rates thus reflect the experience, reputation and quality of plaintiffs' attorneys.

Furthermore, the lodestar figure, by its nature, already includes a substantial enhancing factor: the current rates of the Morris firm were used to calculate the fee award, even though most of the attorney time was incurred much earlier when actual hourly rates were lower. *See Jorstad v. IDS Realty Trust, supra,* 643 F.2d at 1313. Indeed, the stipulated hourly rate for plaintiffs' lead and senior trial counsel were $125 and $110 respectively. If we permitted the district court's bonus and premium to stand, those rates would exceed $250 and $225 per hour.

Finally, the district court's factual findings here simply do not support any further enhancement of the fee award due to the risks involved in this litigation.

In sum, we acknowledge the work done by plaintiffs' attorneys was of high quality, but because we believe that the lodestar award amply compensates plaintiffs' attorneys for the work done, we vacate that portion of

the district court's attorneys' fees award which represents a bonus for risk and quality of representation.

C. *Premium.*

The Star also argues that the district court erred in awarding the plaintiffs a "premium" of $166,332.15 beyond the doubled lodestar amount. We agree with the defendant.

The district court offered no explanation for this "premium." The plaintiffs have not advanced a satisfactory justification that is independent of the rationale given for doubling the lodestar award. Nor can we find any support in the record. It is apparent that the district court added the "premium" to round off the fee award at $2.5 million. Such an addition, without explanation and support in the record, is improper. Accordingly, we also set aside this portion of plaintiffs' recovery for attorneys' fees.

D. *Expert Witness Fee.*

Finally, the Star appeals from the district court's award of costs for plaintiffs' expert witness fees. The district court awarded $312,932.28 to the plaintiffs for the cost of their experts, Dr. Frederick Kirby and Professor Hal Lister.

The Star first contends that the district court had no authority to award costs for expert witness fees. The rule traditionally followed by federal courts is that such fees cannot be recovered as costs beyond the statutory allowances for attendance, mileage and subsistence provided in 28 U.S.C. § 1821. *E.g., Quy v. Air America, Inc.*, 215 U.S.App.D.C. 181, 667 F.2d 1059, 1066-1068 (1981);

State of Illinois v. Sangamo Construction Co., 657 F.2d 855, 866-867 (7th Cir.1981). With increasing frequency, however, federal courts have suggested that the prevailing party may recover expert witness fees when the expert's testimony was crucial to the resolution of the case. *See, e.g., Roberts v. S.S. Kyriakoula D. Lemos,* 651 F.2d 201, 204-206 (3d Cir.1981); *Cagle v. Cox,* 87 F.R.D. 467, 471 (E.D.Va.1980); *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534, 541 (N.D.Miss.1978).

In *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964), the Supreme Court indicated that Fed.R.Civ.P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821.[19] In *Welsch v. Likins,* 68 F.R.D. 589, 597-598 (D.Minn.1975), the district court, relying on *Farmer v. Arabian American Oil Co., supra,* held that expert witness fees may not be recovered as a matter of course, but a trial court has discretion to award them when "they were particularly necessary under the circumstances of the individual case." This Court affirmed the district court's decision on the basis of the lower court's opinion. *Welsch v. Likins,* 525 F.2d 987 (8th Cir.1975) (per curiam).

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19. The Supreme Court stated:

> We do not read that Rule [54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny * * *. Therefore the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation.

Farmer v. Arabian American Oil Co., 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964).

The Third Circuit also adopted this approach in *Roberts v. S.S. Kyriakoula D. Lemos, supra,* 651 F.2d at 206. It stated:

> A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expenditures necessary to the litigation. While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to insure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensible litigation expenditures.

We believe that this approach is the proper one. Accordingly, we conclude that the district court here had discretion to award costs to plaintiffs for their expert witness fees.[20]

The Star next contends that even if expert witness fees are recoverable in some cases, the district court erred in awarding them here. First, the defendant claims that the court failed to find that the testimony of either expert was "indispensable" or "crucial" to the issues decided below. We agree that a district court must make such a finding, *Welsch v. Likins, supra,* 68 F.R.D. at 596-597; but we believe that the court here has fulfilled that obligation. It stated:

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20. The plaintiffs here did not seek approval from the district court to introduce their expert testimony. Although some courts have found that expert witness fees may be awarded only if the party employing experts has made prior application to tender that testimony, *e.g., Cagle v. Cox,* 87 F.R.D. 467, 471 (E.D.Va.1980), the majority of courts have not required such prior application. *E.g., Roberts v. S.S. Kyriakoula D. Lemos,* 651 F.2d 201, 205-207 (3d Cir.1981); *Welsch v. Likins,* 68 F.R.D. 589, 597-598 (D.Minn.1975), *aff'd,* 525 F.2d 987 (8th Cir. 1975) (per curiam). We also decline to adopt a prior approval requirement.

> It seems inequitable and injust to this Court that the enormous expense of the research necessary and the fees of qualified experts to testify, both of which are essential to the plaintiff making a case in a complex antitrust claim such as this one, should not be borne by the defendant when the plaintiff prevails.

This language plainly shows that the district court believed that the testimony of Kirby and Lister was "crucial" or "indispensable" to plaintiffs' case; its failure to use those precise words is of no significance. The district court refused to award costs for expert witnesses who did not testify, even though their work was "undoubtedly most helpful" to plaintiffs' case.

Second, the Star argues that even if the district court utilized the "crucial" or "indispensable" standard, it erred in finding that the testimony of Dr. Kirby satisfied this requirement. We must also reject this argument. Dr. Kirby testified extensively concerning the possible economic impact of defendant's proposed action, including the unlikelihood that it would produce any significant distribution economies or result in lower prices or better service. *See supra,* at 332. As discussed above, the competitive impact of the Star's proposed refusal to deal is the most important issue in this case. Dr. Kirby's research and the evidence that resulted from it were relevant to that issue. Consequently, the district court did not err in permitting the plaintiffs to recover the cost of his fees.

VI.

CONCLUSION.

For the foregoing reasons, we hold that the Star's proposed refusal to deal with the independent carriers constitutes a monopolistic practice in violation of Section

2 of the Sherman Act, that it threatens the plaintiffs with sufficient "loss or damage" to satisfy the statutory requirement for a private cause of action for injunctive relief, and that the remedy ordered by the district court is proper. We also hold that the plaintiffs are entitled to the costs and attorneys' fees, except for the bonus for risk and quality of representation and unexplained premium, awarded by the district court. Accordingly, the judgment and order of the district court is affirmed as modified.

HENLEY, Senior Circuit Judge, dissenting.

Because I am convinced that the Star's decision to change its distribution system was based on legitimate business justifications and produced no unreasonable anticompetitive effects, I respectfully dissent.

Although I am not in basic disagreement with much of the majority's statement of the law, I think it is important to remember that monopolies are not prohibited from making legitimate business decisions,[1] and that it is only those decisions which result in *unreasonable* anticompetitive effects that are condemned. *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 860 (6th Cir. 1980); *Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Co.*, 615 F.2d 1372, 1388-89 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980). The district court found, and the majority agrees, that the change from an independent carrier to an agency distribution system was based on legitimate business reasons. Nevertheless, the district court concluded that defendant was in violation of § 2 of the Sherman Act

1. "[S]ince we tolerate the existence of some monopolists, we must give them some leeway in making business decisions." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 862 (6th Cir.1980).

based on the following findings: that the Star was a potential competitor of the independent carriers; that the resulting competitive tension had a retardant effect on retail prices; and that the elimination of that retardant effect by the Star's vertical integration had an anticompetitive effect on the relevant metropolitan daily newspaper market.

I have some doubt as to the validity of characterizing defendant as a potential competitor, *cf. Universal Life Distributors, Inc. v. Northwest Industries, Inc.*, 452 F.Supp. 1206, 1219-24 (D.Md.1978), *aff'd in pertinent part*, 602 F.2d 1173 (4th Cir.1979) (manufacturer that made isolated de minimis sales in exclusive territory of distributor was not a competitor), and as to the significance of any retardant effect on prices resulting from defendant's "hovering presence" on the fringe of the retail market,[2] *cf. United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32, 93 S.Ct. 1096, 1100, 35 L.Ed.2d 475 (1973) ("Suspect also is acquisition by a company . . . so situated as to be a potential competitor and likely to exercise *substantial* influence on market behavior." (emphasis added)), but I will accept these findings for present purposes. I am more troubled with the district court's finding that the elimination of this possible retardant effect had an unreasonable anticompetitive impact on the market.

The district court's concern with the loss of this negligible price retardant influence might have been alleviated had it given weight to the recognized retardant

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2. These findings are based in part on evidence that the Star reserved the rights to sell directly to customers and to cancel independent carrier contracts on four days notice. As noted by the district court, however, the evidence suggests that in one year the Star sold directly to only about 200 customers out of a total circulation of about 330,000. It was also observed that the Star "exercised the right to sell direct, . . . only once, probably, against the wishes of the carriers."

effect of the economic theory of optimum monopoly price, as described by the majority, *supra* at 328. I realize, however, as does the majority, that vertical integration by a monopoly can have anticompetitive effects.[3] Three situations have been identified as counteracting the theory of optimum monopoly price, thus making it potentially profitable for a monopolist to integrate forward even if it is less efficient than those it replaces: (1) where integration allows price discrimination, (2) where integration erects barriers to first-level entry, and (3) where integration permits evasion of regulation of first-level monopoly profits. *Byars v. Bluff City News Co., Inc.*, 609 F.2d at 861.

The majority found no record support for the contention by the Star and amicus that none of these anticompetitive situations exist in the present case. It is to be noted, however, that the burden is not on defendant to prove the absence of anticompetitive effects, but rather it is plaintiff's responsibility to prove all the elements of an antitrust violation, as the majority seems to acknowledge, *supra* at 327. *See Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir.1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978). I do not think this burden has been met. Furthermore, with respect to the Star's contention, I interpret the record somewhat differently than do my brothers. First, there is little danger that a change to an agency distribution system will result

3. It has been suggested that one of the factors to consider in determining the consequences of vertical integration is the degree of competition between the two levels. Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv.L.Rev. 1720, 1726 (1974). That is, the higher the degree of competition between the two levels, the lesser the benefit to be anticipated by vertical integration. Given the minimum degree of competition, or potential competition, between the Star and the independent carriers, one might expect little by way of adverse effect of forward integration.

in price discrimination because one of the primary purposes of the new system is to permit the establishment and advertisement of uniform prices.[4] As for barriers to first-level entry, the district court found that the new distribution system "would not be likely to make a difference to . . . future daily metropolitan newspapers."[5] Finally, it is not suggested that the Star is attempting to evade governmental price regulation.

To further aid in analyzing the antitrust implications of a monopoly's vertical integration, the Sixth Circuit, in *Byars v. Bluff City News Co., Inc., supra,* listed several factors to consider. The first two factors, efficiency and the existence of legitimate business reasons, weigh in favor of defendant. The independent carrier system was described in the statements of Capital Cities' officials, quoted by the majority *supra* at 331, as "unwieldly" and "cumbersome." The district court found, and the majority does not disagree, that the Star had legitimate business reasons for its decision which included such efficiency considerations as the assurance of more rapid "starts" for new subscribers, and the establishment of uniform policies re-

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4. The fact that the Star would have control over the price is not by itself a violation of antitrust law. *Hardin v. Houston Chronicle Publishing Co.*, 434 F.Supp. 54, 57 (S.D.Tex. 1977), *aff'd*, 572 F.2d 1106 (5th Cir.1978).

5. A survey of cases reveals the emphasis placed on finding a barrier to first-level entry. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (monopoly power company not only refused to sell wholesale to some municipalities but aso refused access to other wholesale sources); *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927) (monopolist manufacturer prohibited dealers from handling competitive goods); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977) (elimination of competitor unreasonable where manufacturer's market power enhanced and ability of other manufacturers to compete diminished).

garding collection, payments, and customer complaints, all of which were recognized by the district court as problems under the independent dealer system. *See* majority opinion *supra* at 331 n. 12.

The court in *Byars* placed special emphasis on the third factor, a showing of predatory acts. 609 F.2d at 863. There is no evidence of "dirty tricks" in the present case. *See Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977) (exercise of contractual rights of termination "can hardly be deemed 'unfair'"). On the contrary, it seems that the Star acted in good faith by offering the independent carriers the opportunity to negotiate non-exclusive agency contracts providing a comparable income.

The majority attempts to bolster the district court's finding of anticompetitive effects by referring to specific evidence in the record which, it is asserted, indicates that the implementation of the new system will result in higher prices and fewer subscription alternatives. We are not told to what extent, if any, higher prices might be necessitated by general economic conditions, regardless of the distribution method. Moreover, the record indicates that the majority of subscribers paid between \$5.00 and \$6.00 for a full subscription and between \$4.00 and \$6.00 for a split subscription, with rates on some routes ranging as high as \$6.75 for a full and more than \$6.00 for a split subscription. Thus, the Star's rates of \$6.00 for a full and \$5.00 for a split subscription appear to be well within the range of rates charged by the independent carriers. As for the number of subscription options, the majority refers to evidence that the independent carriers collectively offer ten alternatives, but it is not clear how many options are

available to the customers on various individual routes or how many options are offered by the Star.

I do not disagree that some customers may pay a somewhat higher price and that some customers might have fewer options. On the other hand, it appears that some customers will pay lower rates and might have more alternatives from which to choose. The imposition of a slightly higher price and the possible diminution of options for some customers are outweighed, in my view, by the benefits to the customers of uniform prices and services, and do not amount to unreasonable anticompetitive effects.

Although to some extent each case must be judged on its facts, *Auburn News Co., Inc. v. Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir.1981), *cert. denied*, 455 U. S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982), a survey of relevant cases indicates that the decision of the Star to terminate the contracts of the independent carriers is not in violation of antitrust law. It has been observed that "[c]ourts have uniformly refused to enjoin newspaper publishers from changing, for valid business reasons, their systems of distribution from that of independent distributors to direct sales."[6] *Hardin v. Houston Chronicle Publishing Co.*, 434 F.Supp. 54, 57 (S.D.Tex.1977), *aff'd*, 572 F.2d 1106 (1978), and cases cited therein. This appears to be true whether or not the newspaper in question is a monopoly. *See, e.g., Auburn News Co., Inc. v. Providence Journal Co., supra; Newberry v. Washington Post*

6. Industry practice may be considered when analyzing a monopolist's conduct. *See Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Co.*, 615 F.2d at 1388-89, *citing Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F.Supp. 125 (D.Mass.1959), *modified*, 284 F.2d 582 (1st Cir.1960).

Co., 438 F.Supp. 470 (D.D.C.1977); *Grill v. Reno Newspapers*, 6 Media L.Rep. (BNA) 1818 (D.Nev.1980).[7]

No inference that a business decision to modify distribution enjoys an absolute immunity from antitrust ramifications should be drawn. However, the application of the well-reasoned analysis in *Byars v. Bluff City News Co., Inc., supra*, leads to the conclusion that the Star's decision was justified by legitimate business reasons, produced no unreasonable anticompetitive effects, and therefore was not in violation of § 2 of the Sherman Act.[8] The

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7. The majority correctly notes, *supra* at 327 n.8, that the court in *Auburn News* found no antitrust violation because there was no reduction of competition in the delivery market. The court's conclusion was based on the finding that independent dealers operated in exclusive territories, as in this case, and did not compete with one another. It is not clear from the opinion in *Auburn News* whether the newspaper publisher retained the right, under its independent dealer distribution system, to sell directly to consumers. Common sense suggests, however, that such a reservation would be advisable to protect the publisher by allowing direct sales in certain circumstances, for example at the request of an independent dealer or when a dealer fails to deliver to its subscribers.

The majority also finds *Newberry* inapposite as not involving an alleged refusal to deal. *See supra* at 333. The court in that case, however, discussed the antitrust ramifications of the change in distribution system and, in finding no violation, stated "[a] dealer system imposed by this Court would amount to undue interference with the seller's right to fashion the manner in which he chooses to sell his own product." 438 F.Supp. at 485.

8. The present case can be distinguished from the following cases in which antitrust violations were found. In *Otter Tail Power Co. v. United States, supra*, a monopoly power company's refusal to sell wholesale to certain municipalities or to "wheel" power from other wholesalers resulted in evasion of first-level profit regulation and erected barriers to first-level entry by other wholesalers. In addition, the company apparently initiated a program of harassing litigation to protect its monopoly position. In *Eastman Kodak Co. of New York v. Southern Photo Materials Co., supra*, the Court, although focusing on the issue of monopolistic intent, noted the absence of business justifications for defendant's refusal to deal. 273 U.S. at 375, 47 S.Ct. at 404. Similarly, in *Poster Exchange, Inc. v. National Screen Service*

(Continued on following page)

effect of invoking the Sherman Act in this case serves not to protect competition, which was found to be de minimis, nor to protect the consumers, but to protect the market value of the independent carrier routes by prohibiting the Star from exercising its bargained-for contractual right of termination, a result which, in my opinion, is not contemplated by the Act. *Cf. Auburn News Co. v. Providence Journal Co.*, 659 F.2d at 278 (Sherman Act not violated by vertical integration even though distributors could not remain in business).

I would therefore reverse the district court's finding of an antitrust violation and refuse to award costs or attorney fees.[9]

Footnote continued—

Corp., 431 F.2d 334 (5th Cir.1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971), a monopoly producer and national distributor of motion picture advertising accessories refused to deal with a local distributor. The district court's finding of an antitrust violation was held to be supported by the absence of sound business reasons and defendant's "grossly predatory practices." *Id.* at 340-41.

9. Given the overall result reached by the majority the award of attorney fees is appropriate. However, I would adhere to the traditional American rule, *supra* at 338, and disallow expert witness fees over and above the statutory allowances provided in 28 U.S.C. § 1821.

(Filed March 1, 1982)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

Civil Action No. 75-CV-36-W-2

GWELDON LEE PASCHALL,

and

ALL INTERVENORS,
Plaintiffs,

v.

THE KANSAS CITY STAR COMPANY,
Defendant.

JUDGMENT OF PERMANENT INJUNCTION AND FOR ALLOWANCE OF ATTORNEYS' FEES AND COSTS

This cause having come on to be heard, and the Court having considered the opinion of the Eighth Circuit Court of Appeals in this case as well as the pleadings, evidence, briefs and arguments of all counsel, has found the issues in favor of plaintiff and intervenors, which findings of fact and conclusions of law are set forth in the Court's Memorandum Opinion filed July 31, 1981, its Order Awarding Attorneys Fees and Costs filed February 12, 1982 and its Order and Permanent Injunction filed February 16, 1982; therefore, it is:

ORDERED, ADJUDGED and DECREED that:

I.

(A) "Defendant" means The Kansas City Star Company, its successors and assigns.

(B) "Newspapers" means the newspapers presently published by defendant, *The Kansas City Times* and *The Kansas City Star*.

(C) "Plaintiff and Intervenors" means plaintiff Gweldon Paschall and those intervenors who as of the date of this injunction are parties to contracts with defendant providing for the purchase of newspapers from defendant for the resale and delivery of those newspapers to home subscribers and other customers.

(D) "Person" means any individual, corporation, association, or other business or legal entity.

II.

The provisions of this Permanent Injunction shall apply to defendant, its officers, agents, servants, employees and attorneys, and to all other persons acting or claiming to act under, through or for defendant, who shall have received actual notice of this Permanent Injunction by personal service or otherwise.

III.

Defendant has been found to threaten a violation of Section 2 of the Act of Congress of July 2, 1890, 15 U.S.C. Section 2, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act. That threatened violation arises from defendant's announced intention to refuse to sell its newspapers to the plaintiff and intervenors in order to substitute a new method for the sale and dis-

tribution of its newspapers by which defendant would sell its newspapers directly at retail to home subscribers and other customers and would contract with individuals to provide newspaper delivery and related services for defendant to such retail customers for a fee.

IV.

Defendant is enjoined and restrained from terminating its existing contract with any plaintiff and intervenor and is further restrained from refusing to sell its newspapers at wholesale to any plaintiff or intervenor except for material breach of the contract between the parties.

V.

In the event defendant proposes to terminate any existing contract with any plaintiff or intervenor, for alleged material breach, the defendant shall give written notice to the carrier of the alleged breach and the carrier shall have ten (10) days in which to fully comply with the terms of the contract without the penalty of termination. The carrier shall also have an additional twenty (20) days (or a total of thirty (30) days) after such notice, to secure a successor to whom the contract may be assigned, subject to the approval of the defendant. Such approval shall not be arbitrarily withheld but shall be governed by the same standards used by defendant in past years in approving or disapproving assignees of these carrier contracts.

VI.

Nothing in this Injunction shall be construed to prohibit the defendant from exercising its right to compete with plaintiff and intervenors by selling its newspapers at retail to home subscribers and other customers.

VII.

Jurisdiction of this cause is retained by this Court for the purpose of enabling any party in interest to apply to this Court at any time for such further orders and directions as may be necessary for the construction of this Injunction and for the purpose of enforcement and compliance therewith, and for the prevention of violations thereof.

VIII.

As and for attorneys fees provided by statute, the plaintiff and all intervenors, except E.M. Crum, Jerry D. Shuck, J. Kenneth Coles, and Sarah Prater Coles, recover of the defendant the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) with interest thereon at the rate of 9% as provided by law until paid.

IX.

As and for costs of suit as provided by statute, the plaintiff and intervenors shall recover of the defendant the sum of Three Hundred Forty Two Thousand Three Hundred Thirty-nine and 42/100 Dollars ($342,339.42), with interest thereon at the rate of 9% as provided by law until paid.

X.

As and for attorneys fees provided by statute, the intervenors, E.J. Crum and Jerry D. Shuck recover of the defendant the sum of One Thousand Eight Hundred Thirty Dollars ($1,830.00) with interest thereon at the rate of 9% provided by law until paid.

XI.

As and for attorneys fees provided by statute, the intervenors, J. Kenneth Coles and Sarah Prater Coles, recover of the defendant the sum of One Thousand Five Hundred Dollars ($1,500.00) with interest thereon at the rate of 9% as provided by law until paid.

/s/ William R. Collinson
William R. Collinson
Senior United States
District Judge

March 1, 1982

(Filed July 31, 1981)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

Civil Action No. 75-CV-36-W-2

GWELDON LEE PASCHALL,

and

ALL INTERVENORS,

v.

THE KANSAS CITY STAR COMPANY.

MEMORANDUM OPINION

A comprehensive history of this case to date will be found in the opinion of the Eighth Circuit Court of Appeals in *Paschall v. Kansas City Star Company*, 605 F.2d 403 (8th Cir. 1979). To summarize, the original trial judge bifurcated the issues of liability and damages and tried only the question as to whether the proposed action of the defendant to cancel the independent carrier contracts of the plaintiffs and intervenors would constitute a violation of Section 2 of the Sherman Act.

That Court's memorandum of decision (unpublished) contains numerous findings of fact and conclusions of law which, in the present posture of the case, this Court considers to be the law of the case. That Court concluded that the proposed action by the defendant would be a violation of Section 2 of the Sherman Act, and certified an interlocutory appeal from that ruling.

The Court of Appeals determined that the case was not ripe for decision, and declined to rule on the questions certified, and remanded the case for further proceedings, directly specified in that opinion. The Court of Appeals held that the issues of "injury" and "causation" and, if necessary, appropriate relief should be determined by the district court upon the remand. Fortunately, that opinion also contains a discussion of the applicable law on these issues, and this Court considers these statements as the law of the case.

This Court therefore held an evidentiary hearing which was strictly limited to the above issues delineated by the Court of Appeals to be determined upon remand.

In addition to the many facts already found by the preceding trial judge, this Court finds certain additional and explanatory facts necessary to this decision.

The Court finds that the "operating" plaintiff and intervenors are all "independent carriers," operating as such under separate but identical (except for territory) contracts with the defendant. As such, each is the entrepreneur of his separate business. In that business, each purchases a quantity of daily papers from the defendant at a wholesale price and sells them at a retail price. Except for a very small percentage of the total sales, the papers are sold at a retail delivered price. Each independent carrier fixes his own retail price, keeps his own books, makes his own collections, and stands the loss of bad credit. Each solicits new customers, selects and pays his own employees to make the deliveries, and furnishes the motor vehicles and other equipment necessary to make the deliveries.

Each independent carrier contract involves a different geographic territory or a different route in which or on

which the carrier operates. For over 50 years these contracts have been bought and sold. The person purchasing such a contract, after agreeing on the purchase price with the seller, would go to the Circulation Manager of the Kansas City Star and notify him of the purchase. The Star would then check the reliability and credit standing of the purchaser and, if it was satisfactory, would approve the purchaser and enter into a new independent carrier contract with him. The evidence showed that only in rare instances would the Star reject the purchaser, in which case the sale was not consummated. The value of these contracts has continually risen through the years, and has been based for the most part on the number of subscribers to whom the seller delivered. By 1966 sales were in the range of $35 to $55 per subscriber. In 1972, one route sold for as much as $160,000. These facts have been well known and acquiesced to by the Star for a number of years, and prior to September 24, 1977, it was the standard practice of the Star to enter into a contract with the successor purchaser.

This Court is under a mandate to determine if the present action by the defendant to monopolize the sales and distribution of its newspaper will cause, in the legal sense, an injury to the plaintiff and intervenors for which they are entitled to relief under the Clayton Act. In one sense, this is really a question of standing, and most cases discussing causation and injury have decided the question as one of standing but in the posture of this case standing was apparently not determined initially. However, it seems obvious that the legal issues discussed in the standing cases are applicable in the present situation.

The difficulty with the whole question of causation and injury is found in the broad wording of the Clayton Act. Section 15, Title 15, U.S.C.A. states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Most of the cases discussing injury are treble damage cases brought under this Section.

However, the Court of Appeals has pointed out that because of the posture of this case, the only relief to which the plaintiff and intervenors would be entitled is injunctive relief. The applicable Section of the Clayton Act is Section 26 of Title 15, U.S.C.A. which states:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . .

This Section, of course, is even broader than Section 15 because it does not contain the restrictive words "in his business or property."

There have been marked differences of opinion in the few reported cases and among the writers on the subject as to whether or not Section 26 broadens the class of persons who can seek relief under that Section over those who can recover damages under Section 15. This Court feels that question was settled in *Hawaii v. Standard Oil of Cali-*

fornia, 405 U.S. 251 (1972) (albeit dictum) in which the Supreme Court advanced a logical theory for the distinction between the two statutes and held that Section 26 afforded relief to persons who could not recover damages under Section 15. The latest case so holding is *Nader v. Air Transport Association of America,* 462 F.Supp. 1035 (D.C.D.C. 1977), which contains an interesting summary of the few decided cases.

It appears to be axiomatic, under all the cases, that a plaintiff who has standing to recover damages for actions of the defendant which violate the Sherman Act would undoubtedly be entitled to injunctive relief if those acts were threatened.

Despite the broad wording of "any person" in Section 15, the first cases under the Act held that only persons suffering direct injury could recover and the earliest cases denied recovery in many cases on the grounds of remoteness. A compilation of these cases may be found in footnote 14 in *Hawaii v. Standard Oil, supra* (l.c. 262). They include suits by stockholders and creditors of corporations which were bankrupted by antitrust violations, landlords, and other parties who suffered damage but were not competitors of the defendant.

As a result of these decisions, it appeared that the courts had adopted a "competitors only" standing doctrine for antitrust actions. *See, Cromar Company v. Nuclear Materials and Equipment Company,* 395 F.Supp. 198 (M.D. Pa. 1975) *reversed* 543 F.2d 501 (3rd Cir. 1976). In reversing, the circuit court in that case adopted the "target area" test of standing and directly overruled the "competitors only" test. The "target area" test has been fully adopted in the Fifth and Ninth Circuits. *See, Tugboat, Inc. v. Mobile Towing Company,* 534 F.2d 1172 (5th Cir. 1976); *Conference of Studio Unions v. Loew's, Inc.,* 193

F.2d 51 (9th Cir. 1951) *cert. denied* 342 U.S. 919 (1952); *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31,* 481 F.2d 122 (9th Cir. 1973) *cert. denied sub nom.*

In the *Cromar* case, the court defined the "target area" rule as follows:

> Each case, therefore, must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a court must decide whether this plaintiff is one "whose protection is the fundamental purpose of the antitrust laws." *In re Multidistrict Vehicle Air Pollution, supra* at 125.

This Court finds that even under the "competitors only" rule, the plaintiff and intervenors in this case are threatened with a direct injury by the threatened acts of the defendant. There has been a determination of law in this case that the threatened acts would constitute a violation of Section 2 of the Sherman Act. The Judge who made that determination also determined that the defendant was an actual competitor (even though *de minimis*) and a potential serious competitor of the plaintiff and intervenors. The injury would be the complete destruction of each plaintiff and intervenor's independent business of buying, selling and distributing of defendant's newspapers. The causation and direct injury are self-evident. If this conclusion is in error, because of the *de minimis* posture of the competition at the present time, it seems axiomatic, under the "target area" principle, that an examination of the nature of the industry, the relation-

ship of the plaintiff to the alleged violator and the admitted effect of the antitrust violation upon the plaintiff and intervenors would demonstrate causation, threatened injury and the right to equitable relief by way of an injunction.

The defendant argues that the plaintiff and intervenors will suffer no injury because it has offered to employ each of them as a carrier to deliver papers in the territory in which they are presently operating and that in this employment they will make "approximately" the income they are now receiving from their independent business operation. This Court is not impressed with this argument and finds it obvious that to lose an independent business, which has a substantial monetary value which could be sold or would go to the independent carrier's estate upon death, cannot be compared to a contract of employment.

For the above reasons, the Court finds that the threatened acts of the defendant Kansas City Star, which, under the law of this case, would constitute a violation of Section 2 of the Sherman Act, would be the direct cause of substantial injury to the plaintiff and intervenors and they are therefore entitled to injunctive relief.

This memorandum shall constitute this Court's findings of fact and conclusions of law upon the sole issues of injury and causation as directed by the Court of Appeals. The Court will enter an appropriate permanent injunction based on these conclusions. Plaintiff and intervenors' counsel are directed to file their Application for Allowance of attorneys fees on or before August 14, 1981.

DATED: July 31, 1981.

/s/ William R. Collinson
William R. Collinson
Senior United States District Judge

(Filed January 15, 1979)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 75-CV-36-W-4

GWELDON PASCHALL,
Plaintiff,

and

All Intervenors,

vs.

THE KANSAS CITY STAR COMPANY,
Defendant.

MEMORANDUM AND ORDER ON MOTION TO AMEND MEMORANDUM OF DECISION

The defendant seeks an amendment of the memorandum of decision, urging a revision of a legal conclusion, but not of the factual findings. The argument is that the legal conclusion is without supporting authority, is inconsistent, is contrary to the rule of reason, and is self-defeating. The argument is attractive, but unavailing.

It is true that no case or author, as far as I can tell, has said previously that a monopoly moving *to* a practice of selling directly and hiring others to distribute its product to its customers and refusing to sell to all others who have been selling and distributing it, *from* a position of being an incipient direct competitor in sales and distribution—which incipiency has been having a significant impact on the market—constitutes monopolizing or attempting

to monopolize within the meaning of § 2 of the Sherman Act. It is also true that no case or author, as far as I know, has said that it does not. That part of the argument is a draw.

[*Monopolization—Rule of Reason*]

Inconsistency comes, to be sure, if I have found, as the defendant thinks I have found, that the defendant's proposed plan does not amount to monopolization, yet have found that the defendant's plan is violative of §2. Here, the defendant misconceives my conclusions. Before the defendant refuses to sell to the plaintiffs and uses delivery agents exclusively, there *is* competition—not direct competition involving sales and distribution by the defendant to others than the plaintiffs, but an impact, real and significant, arising from a competitive tension, maintained by the defendant's pressuring presence. Once the defendant refuses to sell to the plaintiffs, sells to the customers itself, and uses delivery agents for distribution, the competitive tension will be gone. Whereas there has been a retardant effect on retail prices until now, there will no longer be, because the cause will have disappeared. That is an anticompetitive result. It is a spreading of the defendant's monopoly. It is an act of monopolization, quite in accord with the rule of reason.

[*Direct Sales v. Sales to Carriers*]

Finally, the defendant argues that the court's ultimate legal conclusion is self-defeating and suggests that the defendant under the court's view will have only two alternatives: to continue to sell to the plaintiff carriers without engaging in direct competition with them, or to sell to the plaintiffs and compete directly with them. As to the first alternative, the argument is that the court's requir-

ing the defendant to sell to the plaintiffs will have the result of eliminating whatever competitive effect there has been, if the defendant decides not to sell direct to its customers. That sounds right, but it is scarcely a reason for saying that the defendant, a monopoly, should be permitted to eliminate the competitive effect. The defendant goes on to claim that the defendant is prevented from using the second alternative, because *Albrecht v. Herald Co.* [1968 TRADE CASES ¶72,373], 390 U. S. 145 (1968), forbids the defendant's selling to its customers at the same time it sells to the plaintiff carriers for resale. I do not read *Albrecht* to say that. The case forbids the making of agreements with others to "force [the plaintiffs] to conform to the advertised retail price," *Id.* at 149, but it does not appear to me that selling direct to customers and hiring other carriers to deliver the papers to the customers is akin to making agreements to force the plaintiffs to conform to an advertised retail price or any other price. My guess is that the defendant would care little if the plaintiffs would not conform to an announced price, as long as the defendant could sell direct to the customers and had a viable delivery system. Although the defendant claims to foresee a likelihood of the court's having to monitor the defendant's daily decisions in order to make certain that the defendant did not violate *Albrecht,* I think the fear is unduly magnified.

The motion also asks that, if there is no amendment of the memorandum of decision, the court direct the entry of immediate judgment on the liability phase of the case in order that the defendant may proceed to seek immediate appellate review. Whether such a review would materially advance the ultimate termination of the litigation can better be decided by Judge Elmo B. Hunter, who is charged with the responsibility for all other phases of

the case. In denying the motion, therefore, I am not intending to decide that the issue of liability should not be made appealable under 28 U. S. C. § 1292(b).

It Therefore Hereby Is Ordered that the motion to amend memorandum of decision is denied.

BY THE COURT

/s/ WARREN K. URBOM
United States District Judge

(Filed November 10, 1978)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 75-CV-36-W-4

GWELDON PASCHALL,
Plaintiff,

and

All Intervenors,

vs.

THE KANSAS CITY STAR COMPANY,
Defendant.

MEMORANDUM OF DECISION

For many years The Kansas City Star Company has sold its newspapers to independent contract carriers, who in turn have sold and delivered them to subscribers. In 1977 the company announced that it proposed no longer to sell to carriers but to sell direct to subscribers and to engage carriers to deliver the newspapers. The question is whether implementation of that proposal would violate § 2 of the Sherman Act, which states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

This memorandum of decision constitutes the court's findings of fact and conclusions of law on that single issue, following a trial held October 5, 1978, through October 26, 1978, and resolves that issue in favor of the plaintiff and intervenors, who are about 258 independent contract carriers holding contracts with The Kansas City Star Company. Appropriateness of possible remedies is not discussed, it having been understood from the outset of the recent trial that a separate hearing might be needed for presentation of evidence on that subject, if the decision were for the plaintiff and intervenors.

I. BACKGROUND

The Kansas City Star, founded in 1880 as an evening publication, was expanded in 1894 to include a Sunday morning edition, the *Sunday Star,* and in 1901 to encompass a morning paper, the *Kansas City Times.* The *Star, Times* and *Sunday Star* competed primarily with the *Kansas City Post* after 1905 and the *Kansas City Journal,* which from 1854 produced a morning and Sunday newspaper. The *Post* and *Journal* merged in 1922 but went out of business in 1942. Since 1942 the *Kansas City Star, Times* and *Sunday Star,* all published by The Kansas City Star Company and all different editions of the same newspaper, have been the only daily metropolitan newspaper published in and circulated throughout the Kansas City metropolitan area.

In 1953 a federal grand jury indicted and in 1955 a petit jury convicted The Kansas City Star Company and two of its officials of monopolizing and attempting to monopolize interstate trade and commerce in the dissemination of news and advertising.

II. EXISTENCE OF A MONOPOLY

The initial issue is whether The Kansas City Star Company currently has monopoly power within a product and geographical market.

According to the position of the plaintiff and intervenors, the relevant product market is metropolitan daily newspapers of general circulation and the geographical market is a seven-county area in Missouri[1] and Kansas.[2] I conclude that this position is correct.

In its simplest terms, a product market is the product sold or otherwise dealt with in a business setting for which there is no reasonably available substitute.[3] So, automobile finishes and fabrics were held to be a product market in *United States v E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); ornamental plants (as distinguished from chrysanthemums alone), in *Yoder Bros., Inc. v California-Florida Plant Corp.*, 537 F.2d 1347, 1367-1368 (C.A. 5th Cir. 1976); liquid petroleum gas (as distinguished from natural gas, electricity, wood, coal and fuel oil), in *United States v Empire Gas Corporation*, 537 F.2d 296 (C.A. 8th Cir. 1976); a cluster of services to protect persons and property, made unique by use of a central station that received signals from alarms, such as burglar and fire alarms, in *United States v Grinnell Corp.*, 384 U.S. 563 (1966).

Evidence preponderates that metropolitan daily newspapers in general circulation throughout the metropolitan area of Kansas City are sufficiently different from other media—suburban newspapers, shoppers, handbills, news magazines, television and radio—in purpose, content, technique, and audience appeal to constitute a separate product market. The suburban newspapers are geared primarily to news of the suburb or suburbs in which

the particular newspapers are circulated, offer less international, national and state news of all kinds than does the *Kansas City Star,* which is obviously a metropolitan daily newspaper in general circulation, and offer no stockmarket data. Shoppers and handbills offer almost no editorial content.[4] News magazines feature primarily news of national or international interest and treat those subjects in more depth than daily newspapers are able to do. Television and radio are bent heavily toward entertainment. The news, while afforded greater immediacy, suffers from less permanency by a broadcast media's treatment than by a daily metropolitan newspaper's treatment.

The greater weight of the evidence is that none of the other media alone or in combination with others is a suitable substitute for the metropolitan daily newspaper. Cross-elasticity of both demand and supply is low. See *United States v Empire Gas Corporation,* 537 F.2d 296 (C.A. 8th Cir. 1976). Although circulation of a metropolitan daily newspaper goes down when the price is raised, it generally returns to its former level in the course of time. It is true that there is evidence that suburban newspapers and television have cut into the circulation of metropolitan daily newspapers nationally, but there is no convincing evidence that the effect in the Kansas City area has been more than nominal or that raising the price of The Kansas City Star Company's newspapers results in a noticeable increase in the use of other kinds of newspapers or of broadcast media. Suburban newspapers have been gaining in advertising and undoubtedly are direct competitors of The Kansas City Star Company for advertising dollars, but that does not make them a part of the same product market as the metropolitan daily newspaper. The practical market is to be "defined narrowly to exclude any other product to which, within reasonable

variations in price, only a limited number of buyers will turn. . . ." *Times-Picayune Publishing Co. v United States,* 345 U.S. 594, 612, n. 31 (1953).

Geographically, The Kansas City Star Company's newspapers are distributed primarily in the seven-county area encompassing Kansas City, Missouri, Kansas City, Kansas, and the communities nearby. Between 80 and 84 per cent of The Kansas City Star Company's newspapers are delivered to customers within those seven counties. That is sufficient to make those counties for Sherman Act purposes a relevant geographic market.

The Kansas City Star Company's publications are essentially a cluster of services, offering as a package most of what suburban newspapers, shoppers, handbills, television and radio offer in parts. That feature sets the package apart, much as the cluster of services in *United States v Grinnell,* 384 U.S. 563 (1966).

Only one daily metropolitan newspaper is circulated in the Kansas City metropolitan area—The Kansas City Star Company's product. It publishes all the product that is published within the geographic market and must be considered a monopoly.[5]

Further indication of the monopolistic position is the ability of The Kansas City Star Company to charge different prices for the same product. Under the percentage contracts regularly used since June 1, 1974,[6] the price charged the carriers varies from 25 per cent to 53 per cent of the amount charged a customer by a carrier, and the amount charged customers by the carriers varies substantially.[7] Were there suitable substitutes for The Kansas City Star Company's publications, it is doubtful that such differences in price would be tolerated by the carriers or by the readers.

III. USE OF MONOPOLY POWER

A.

The monopoly enjoyed by the defendant is confined to the publication of metropolitan daily newspapers in general circulation and does not extend to sales and distribution of them. For over half a century The Kansas City Star Company has sold most of its product to independent contract carriers, who have sold and delivered them to readers. Some sales and distribution have been and are by The Kansas City Star Company itself, but the amount is and has been negligible.[8] In most instances, apparently, the direct sales and delivery by the company were because of a demand not being met by a carrier, such as where a carrier abandoned a route, or because a carrier was reluctant to continue carrying an unprofitable portion of a route, or because a carrier decided he did not want to deliver to a particular customer, or because a customer decided he did not want to receive a paper from a particular carrier. In one instance in 1970 a carrier raised prices to customers at an apartment complex and customers complained, whereupon the company delivered papers direct to the customers—45 or 50 of them—if the customers specifically asked the company to do so. Special events, such as the Kennedy assassination, the moon landing, baseball games, or religious conventions sometimes prompted The Kansas City Star Company to sell extra papers direct to readers. In no instance, except the apartment complex incident, did The Kansas City Star Company make deliveries on a carrier's route or under circumstances where a carrier wanted to make the sale and delivery himself. Actual competition, therefore, between the company and the carriers has been de minimus.

Nevertheless, the plaintiff and intervenors argue correctly that The Kansas City Star Company has been a

potential or probable competitor of the independent contract carriers in the sale and distribution wing of the daily metropolitan newspaper business in the greater Kansas City market served by the company's product.

In *United States v Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the court remanded the case for determination of whether Falstaff, before its entry into a geographical market by its merger with another company already in the market, had been "a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market." *Id.*, p. 532-533. The lesson from that case is that removal by a company of its own competitive impact by merging with another company is forbidden by § 7 of the Clayton Act, even where that competitive impact was exercised by the company's being outside of but on the fringe of the market, and even though the company had no subjective intent to enter the market. I see no difference between § 7 of the Clayton Act and § 2 of the Sherman Act in that respect.

The test of whether a competitive impact was induced by the on-the-fringe company is an objective one, the *Falstaff* opinion makes plain. Thus, if The Kansas City Star Company's presence and activities on the edge of the sale and distribution process of its own product reasonably would cause independent contract carriers of the *Star* and *Times* to regard the company as an incipient sales and distribution competitor and a significant impact on the market resulted, then removal of that competitive effect by refusing to sell to the independent contract carriers, selling direct to all subscribers, and hiring carriers to deliver to the subscribers would be violative of § 2 of the Sherman Act, because it would be a seeking to expand the company's monopoly.[9]

Specific intent to expand a monopoly is not necessary. It is sufficient if the expansion occurs from the defendant's conduct or business arrangements, for, as stated in *United States v Aluminum Co. of America,* 148 F.2d 416, 432 (C.A. 2nd Cir. 1945), "no monopolist monopolizes unconscious of what he is doing." When one is "using monopoly power to expand his empire . . . he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did." *United States v Griffith,* 334 U.S. 100, 108 (1948).

The Kansas City Star Company's presence was genuine, pervasive, and effective.

During all pertinent times, the contracts between The Kansas City Star Company and the independent contract carriers explicitly reserved the company's right to sell newspapers direct to readers within each carrier's territory and to cancel a carrier's contract on four days' notice, and required each carrier to maintain for the company a complete list by name and address of each customer.[10] As already noted, the company sometimes exercised the right to sell direct, although only once, probably, against the wishes of the carriers. Additionally, the company did cancel carriers' contracts, whenever it changed the price charged to a carrier, or upon unsatisfactory performance of the carrier, or when the company chose to change the form of the contract.

On May 24, 1974,[11] John W. White, Circulation Manager of The Kansas City Star Company, wrote all the carriers, reaffirming the company's policy of selling newspapers to the carriers for resale and delivery by the carriers and declaring:

". . . While it is certainly not now anticipated, it should be recognized that in the future the Star can and may

> choose to modify or change its circulation system or practices without liability to independent contract carriers. . . ."

Within a week thereafter an up-to-date list of all subscribers was requested of each carrier,[12] and two months later a follow-up request was made.[13] A deadline of August 23, 1974, was set and failure to meet it was to result in termination of the contract.[14] Effective June 1, 1974, all prior contracts with carriers were terminated and new contracts were negotiated, whereby the wholesale price charged to the carriers was changed to a percentage of the retail price charged by the carriers to the readers.

In February, 1977, The Kansas City Star Company was purchased by Capital Cities Communications, Inc. On March 30, 1977, request again was made of all independent contract carriers for up-to-date lists of subscribers and the request followed up by letter April 11, 1977.[15]

On September 24, 1977, James H. Hale, Chairman of the Board of The Kansas City Star Company, wrote all carriers that the company would change its method of distribution, whereby it no longer would sell to independent contract carriers but would sell direct to subscribers with delivery to be made by independent delivery agents. The letter also declared a termination of the existing contract with carriers and invited each carrier to contact the company for an appointment to discuss the terms of a new contract.[16]

It is apparent from the foregoing that, by an objective standard, a person in the position of a carrier reasonably would conclude that The Kansas City Star Company was a potential competitor of the carriers in the selling and distribution segment of the metropolitan daily newspaper business. By contract right, by act, and by word the

company made known its hovering presence at the fringe of the market. There is testimony that that presence tended to have a retardant effect on retail prices to the subscriber, and common sense confirms the reasonableness of that conclusion. If the carrier charged too much, the carriers reasonably would conclude the company would—as it had in the apartment complex episode—exercise its right to cancel the offender's contract and make direct sales and deliveries to the subscribers, however temporarily.

The company's refusal to sell to the carriers necessarily means that the retardant effect of the potential competition is eliminated and the company's monopoly extended into the sales and distribution arena. That result is one guarded against by § 2 of the Sherman Act.

The defendant is correct in urging that changing to a delivery agent system had legitimate business reasons for its adoption. The new system would give the company control over pricing to the subscriber, thereby being able to advertise subscription prices, which is quite impossible where carriers largely determine the ultimate specific prices. It would permit the company to assure more rapid "starts" for new subscribers, and would allow uniform policy regarding time of collection, manner of payment by customers, and method of responding to customer complaints, all of which have been problems under the independent contract carrier system. Nonetheless, the presence of legitimate business reasons, aside from monopolistic desires, makes expansion of a monopoly no less illegal under § 2. As earlier pointed out, specific intent to monopolize is not required. General intent to do the act which in fact extends an existing monopoly is enough for a violation of the Act.

A series of cases cited by the defendant to the effect that newspaper companies may alter their delivery sys-

tems without violating antitrust status is inapposite. None of them—*Newberry v Washington Post Co.*, 438 F. Supp. 470 (U.S.D.C. D.C. 1977); *Hardin v Houston Chronicle Publishing Co.*, 434 F. Supp. 54 (U.S.D.C. S.D. Tex. 1977), aff'd 572 F.2d 1106 (C.A. 5th Cir. 1978); *Lamarca v Miami Herald Publishing Co.*, 395 F. Supp. 324 (U.S.D.C. S.D. Fla.), aff'd without published opinion 524 F.2d 1230 (C.A. 5th Cir. 1975); *Knutson v Daily Review, Inc.*, 383 F. Supp. 1346 (U.S.D.C. N.D. Cal. 1974), rev'd on other grounds 548 F.2d 795 (C.A. 9th Cir. 1976)—except *Newberry* involved a showing of a monopoly. As to *Newberry,* I am not persuaded that its factual setting or rationale is applicable here.

B.

The plaintiff and intervenors also urge that the implementation of the new delivery system contemplated by the delivery agent contract would destroy the carriers as an effective delivery system. I reject the conclusion.

Each independent contract carrier was offered an opportunity to negotiate a new contract whereby he or she would make approximately the same income as under the former contract. The Kansas City Star Company expected to have after December, 1977, a full, motorized delivery system, manned by adult carriers available for delivering the publications of The Kansas City Star Company and other publications as well. Nothing in the delivery agent contracts would prevent or discourage delivery agents from delivering other companies' publications or for that matter, products other than publications, and the evidence does not indicate that The Kansas City Star Company would discourage such deliveries. The probability is that the delivery system intended and likely to develop would be quite as effective and available as the one extant be-

fore the December, 1977, cancellation date. Whether *Kansas City Star-Times* carriers were to buy newspapers from The Kansas City Star Company or only deliver newspapers for that company (this is the only pertinent difference in the contracts[17]) would not be likely to make a difference to the publishers of shoppers, suburban newspapers, or other publications—or future daily metropolitan newspapers—in deciding whether to hire those carriers to deliver products.

It is true that if the *Kansas City Star-Times* carriers were to have no contract with The Kansas City Star Company, the carriers would probably charge more to deliver other products than they now charge and The Kansas City Star Company might thereby gain a competitive advantage, but the contingency of there being no contracts with The Kansas City Star Company was not planned and would not be a natural or probable consequence of actions of The Kansas City Star Company.

For the same reason, I do not find, contrary to the arguments of the plaintiff and intervenors, that the defendant has erected barriers to the entry into the market by future competitors.

Dated November 9, 1978.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

Footnote 1/ Jackson, Cass, Clay, Platte and Ray.

Footnote 2/ Wyandotte and Johnson.

Footnote 3/ Another way of stating it is that the commodities reasonably interchangeable must be considered a part of the product market, thus widening the area of scrutiny for determining whether a monopoly exists. See *United States v Grinnell Corp.*, 384 U.S. 563, 571 (1966).

Footnote 4/ Editorial content is taken to mean anything other than paid advertising.

Footnote 5/ In *United States v Grinnell Corp.*, supra, the court said at 571:

> ". . . In *United States v du Pont & Co.*, 351 U.S. 377, 391, we defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market. In *American Tobacco Co. v United States*, 328 U.S. 781, 797, we said that 'over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes' constituted 'a substantial monopoly.' In *United States v Aluminum Co. of America*, 148 F.2d 416, 429, 90% of the market consisted monopoly power. In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power—power which, as our discussion of the record indicates, they did not hesitate to wield—if that business is the relevant market. . . ."

Footnote 6/ Plaintiffs' Exhibit 1 is such a contract. Some carriers signed option contracts, such as plaintiffs' Exhibits 3(a) and 3(b).

Footnote 7/ For example, it appears that for a subscription of morning, evening and Sunday papers, rates varied, depending upon the carrier, from $3.50 a month to $6.00 a month. Plaintiffs' Exhibit 177. Moreover, some carriers charge different rates on different routes delivered by the same carrier. Transcript, p. 368.

Footnote 8/ Testimony suggested that in 1970, for example, the company sold and delivered directly to about 200 subscribers out of a total circulation of about 330,000. Direct sales were also made by mail, but the number is not shown by the record. Some direct sales were also made by racks in the downtown areas of Kansas City.

> Footnote 9/ ". . . [T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful [under § 2]."
>
> *United States v Griffith*, 334 U.S. 100, 107 (1948)

Footnote 10/ The contract form used before June, 1974, contained this provision:

> ". . . The party of the second part [the Kansas City Star Company] reserves the right to sell said papers to others anywhere in said territory. The party of the second part shall have the right to cancel this contract any time, by giving four days' notice of its intention to do so. Party of the first part hereby agrees to keep for the benefit of and satisfactory to the party of the second part a complete route book, showing name and address of every delivery. . . ."
>
> Plaintiffs' Exhibit 2

The contract form used, for the most part, since June 1, 1974, plaintiffs' Exhibit 1, is virtually identical:

> "Second party reserves the right to sell newspapers to others anywhere along said Route. Second party shall have the right to cancel this contract any time, by giving four days' notice of its intention to do so. First party agrees to keep for the benefit of and satisfactory to second party a complete route book, showing the name and address of every delivery on the above described Route . . ."

An option contract, in the form of plaintiffs' Exhibit 3A, has been used for a limited number of carriers since June 1, 1974, and has a provision in the same words as that just quoted from plaintiffs' Exhibit 1.

Footnote 11/ Plaintiffs' Exhibit 8.

Footnote 12/ Plaintiffs' Exhibit 21.

Footnote 13/ Plaintiffs' Exhibit 47.

Footnote 14/ Plaintiffs' Exhibit 68.

Footnote 15/ Plaintiffs' Exhibit 70b.

Footnote 16/ Plaintiffs' Exhibits 9 and 9b.

Footnote 17/ It is true that the plaintiffs are greatly concerned that the new delivery agent contracts would eliminate any property interest the plaintiffs have in their existing contracts, but all parties have agreed that I need not decide that issue, and I do not do so. Aside from that concern, I have no reason to think that the carriers would be in any less favorable position to remain a viable delivery system under the delivery agent contract than under the independent contract carrier contract

Gweldon PASCHALL, Plaintiff,
and
all Intervenors

v.

The KANSAS CITY STAR
COMPANY, Defendant.

No. 75CV36-W-4.

United States District Court,
W. D. Missouri, W. D.

Oct. 27, 1977.

MEMORANDUM AND ORDER

I

INTRODUCTION

This action now pends before the Court on plaintiffs' motion for a preliminary injunction.

Plaintiffs, independent contract carriers who have contracted with defendant newspaper company, The Kansas City Star Company (The Star), to deliver The Star's newspapers and advertising materials to the public, attack as illegal certain portions of The Star's plan to alter its method of product distribution. This plan, publicly announced by The Star in The Kansas City Star newspaper of September 26, 1977, consists of three parts: First, The Star would terminate all existing contracts with its independent contract carriers as of December 1, 1977. Second, The

Star would thereafter deliver and sell its newspapers directly to subscribers. Third, The Star would no longer supply its product to persons, such as plaintiffs, who desire to conduct a business consisting of the retail distribution of defendant's product to the public.[1]

Plaintiffs do not contest The Star's proposal insofar as it contemplates direct retailing by The Star of its product to consumers. Plaintiffs concede The Star has this right. Plaintiffs do, however, contest The Star's right to accompany its proposed retail distribution scheme with its plan to terminate its existing relationship with plaintiffs. Plaintiffs, in oral argument at the full evidentiary hearing on the preliminary injunction issue, summarized their position thus: The Star must continue to sell its newspapers to the independent carriers at present contract prices, and the independent carriers may sell and deliver these papers in competition with The Star.

II

BACKGROUND

The Star publishes, prints, and distributes its newspapers from its offices at 1729 Grand Avenue, Kansas City, Missouri thirteen times per week. Since approximately 1880, The Star has contracted with various independent parties for delivery of its newspapers and advertising materials to the public. Plaintiffs (contract carriers) are presently parties to such contracts with The Star; however, The Star also has over 500 contracts for home newspaper delivery service with persons not parties to this action.

1. A copy of the typical contract presently governing the rights and duties of The Star and the independent contract carriers is attached to this Opinion as Appendix A. A copy of the proposed contract, under the new system, is attached as Exhibit B.

The present distribution system has the following characteristics:

a) Title to The Star's product passes twice: first, when The Star delivers its paper to the contract carrier and, second, when the contract carrier delivers the paper to the consumer.

b) Each contract carrier sets his own retail price to newspaper subscribers and other customers, subject to the effect of the wholesale percentage pricing.

c) The contract carriers are permitted to, and do in fact, charge subscribers and other customers different rates.

d) The contract carriers may impose additional charges for special types of delivery.

e) The contract carriers assume the risk of noncollection of charges to home delivery subscribers.

f) The contract carriers normally assume the risk of damaged or nondelivered newspapers.

g) The Star may not legally control the rates or prices charged by the contract carriers to home delivery subscribers.[2]

h) The contract carriers are not required to, nor do many of them in fact, physically deliver newspapers but, instead, employ or contract with a third party to make such deliveries.

The distribution method proposed by The Star to be implemented effective December 1, 1977 has the following characteristics:

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2. Stipulated Narrative Facts, ¶ 29 (October 19, 1977).

a) The Star will sell its newspapers directly to subscribers and other customers.

b) The Star will have the responsibility for all subscriber and customer solicitation.

c) The Star will assume all risk of loss of newspapers and credit risks respecting customers. However, to the extent that 100% of collections are not made, The Star's agent will not receive his portion of the uncollected amounts.

d) The Star will bear all risk of damaged or nondelivered newspapers.

e) Title to the newspaper will pass but once (from The Star to the consumer), passage of title to occur upon delivery to the subscriber.[3]

f) The Star will receive all subscriber and customer complaints and is to be responsible for service of all subscriber and customer requests.

g) The Star will be able to set uniform prices charged to home delivery subscribers.

Under the proposed distribution system, The Star states that it will have more control over the quality

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3. With regard to passage of title and risk of loss, the proposed contract provides: "Newspapers to be supplied to Delivery Agent hereunder shall remain the property of The Star until delivery to all regular subscribers and others designated by The Star. Accordingly, risk of loss of newspapers and credit risks respecting customers shall remain that of The Star; provided however, that nothing herein shall limit Delivery Agent's liability to The Star for any negligent or wrongful act respecting delivery of the newspapers or monies collected by Delivery Agent or otherwise. Delivery Agent shall be the agent of The Star for collection and delivery only and shall have no right or authority to assume or create any other obligation of any kind, expressed or implied, on behalf of The Star, it being intended that Delivery Agent shall be and remain an independent contractor." Exhibit M, "Delivery Agent Contract," ¶ 3.

of newspaper delivery service to subscribers and other customers. However, while subscription rates are expected to be the same or lower in some instances under the proposed system, in most instances, rates will be higher.

Perhaps a more thorough understanding of the distinctions between the present and proposed system will result from an examination of certain statements made by the Star itself. With regard to the present distribution system, The Star, in a statement published in 1947, said:

> There are 208 contract carriers of The Star in Greater Kansas City. These men own their own routes and have in many instances large investments in them. They buy their papers from The Star wholesale at specified rates. They either deliver these papers themselves or employ assistants or helpers to deliver them. They own their own equipment which they use to transport the papers for delivery. They handle their own collections and operate as independent merchants or contractors, each with an individual contract which defines specifically his relationship to The Star.[4]

By letter dated May 24, 1974 from The Star's circulation manager to all independent contract carriers, The Star stated:

> The Star enters into a personal service contract with an independent contractor to sell newspapers at wholesale for the independent contractor's resale and delivery as provided in the contract. The carrier is not an employee of the Star but rather is an independent contractor who undertakes to resell and deliver the newspapers purchased by him in a prompt and satisfactory manner.[5]

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4. Exhibit I.
5. Exhibit D.

The existing contract between defendant and its carriers provides:

> It is agreed by and between the parties that first party [the contract carrier], his agents and employees, in delivering and selling the newspapers herein mentioned, is acting as principal, on his own responsibility, and in no particular is he acting for, or in behalf of, or as agent of second party [the Star], and said first party shall have no right, power or authority to bind second party by any act or deed on his part or on the part of any of his agents, servants or employees, and first party agrees to indemnify and hold harmless second party from any loss of liability of whatsoever kind and character, arising out of or in any manner connected with the execution of this contract.[6]

By letter dated September 24, 1977 from The Star's Chairman of its Board of Directors to all independent contract carriers, The Star stated:

> On September 23, 1977, the Kansas City Star Company determined that effective December 1, 1977, it must change its method of distributing its newspapers.
>
> Effective December 1, 1977, the Star Company will no longer sell its newspapers to independent contract carriers but will sell directly to subscribers with delivery to be made by independent delivery agents. Therefore, effective December 1, 1977, the contract between you and The Kansas City Star Company for newspaper sale and delivery is terminated.
>
> An agent who enters into a new contract with The Star Company will be paid by The Star Company for each newspaper delivered and a percentage of the

6. Exhibit K.

monies collected from all subscribers in the area where delivery is made by the Agent. It is the desire of The Star Company that under the new delivery arrangement you as an agent will be compensated approximately the same amount of money per regular subscriber as you presently receive. If you are interested in contracting with the Star Company for delivery of its newspapers and collecting from the Star Company's regular subscribers, please contact the Circulation Department for an appointment to discuss the terms of the contract.[7]

The contract presently in effect between the independent contract carriers and The Star provides the following formula for computation of the compensation to be received by the Star and the carriers:

> First party [the carrier] agrees to pay to second party [the Star] for all newspapers purchased by him and delivered by him to regular subscribers at the following rates: .... percent (........%) of the entire amount charged by first party (excluding sales or use taxes) to each regular subscriber for The Kansas City Star, The Kansas City Times, and the Sunday edition of The Kansas City Star, computed on a weekly basis; .... percent (........%) of the entire amount charged by first party (excluding sales or use taxes) to each regular subscriber for The Kansas City Star and the Sunday edition of The Kansas City Star, computed on a weekly basis; .... percent (........%) of the entire amount charged by first party (excluding sales or use taxes) to each regular subscriber for The Kansas City Times and the Sunday edition of The Kansas City Star, computed on a weekly basis.

7. Exhibit C.

For all extra copies of newspapers ordered by first party which are not distributed to regular subscribers but which are to be sold to newsboys or dealers or direct at retail to purchasers (or as a second copy of The Times, Star or Sunday Star to regular subscribers) first party agrees to pay as follows: .... cents per copy for The Kansas City Star, ... cents per copy for the Kansas City Times, and .... cents per copy for the Sunday edition of The Kansas City Star.[8]

According to the testimony, the rate generally collected by The Star was 38% of the price received by a carrier from a "full subscriber" (one who subscribes to thirteen papers per week) and 37% of the price received by a carrier from a "split subscriber" (one who subscribes to 7 papers per week).

Under the proposed contract, compensation of the carriers would be governed by the following language:

6. The Star will pay Delivery Agent a fee of .... cents (........¢) per copy for each Monday through Saturday edition of the newspaper delivered by Delivery Agent to regular subscribers designated by The Star.

7. The Star will pay Delivery Agent a fee of .... cents (........¢) per copy for each Sunday edition of the newspaper delivered by Delivery Agent to regular subscribers designated by The Star.

8. The Star will pay Delivery Agent a fee for each newspaper delivered by Delivery Agent to each customer designated by The Star, other than regular subscribers, or for samples Delivery Agent is requested to deliver by Star, as follows: ....¢ per copy for the Monday through Satur-

8. Exhibit K.

day edition of the newspaper and ....¢ per copy for the Sunday edition of the newspaper.

9. Delivery payments shall be made by The Star to Delivery Agent by the tenth day of each month or on the first regular business day thereafter for newspapers delivered by Delivery Agent during the preceding calendar month.

10. The Star will pay Delivery Agent a fee based on the following percentages of all monies (excluding sales or use taxes) collected or received from those to whom Delivery Agent makes delivery who subscribe to the Monday through Saturday editions of The Kansas City Times and The Kansas City Star newspapers and the Sunday edition of The Kansas City Star newspapers.

Percentage of Collection	Collection Fee
0- 75%	.........% of the sum collected, plus
76- 90%	.........% of all sums collected over 76%, plus
91-100%	.........% of all sums collected over 91%

11. The Star will pay Delivery Agent a fee based on the following percentages of all monies (excluding sales or use taxes) collected or received from those to whom Delivery Agent makes delivery who have subscribed to the Monday through Saturday editions of The Kansas City Times newspapers and the Sunday edition of The Kansas City Star newspaper or Monday through Saturday editions of The Kansas City Star newspapers and the Sunday edition of The Kansas City Star newspaper.

Percentage of Collection	Collection Fee
0- 75%	.........% of the sum collected, plus
76- 90%	.........% of all sums collected over 76%, plus
91-100%	.........% of all sums collected over 91%

12. The Star will pay Delivery Agent a fee based on the following percentages of all monies (excluding sales or

use taxes) collected or received from those to whom Delivery Agent makes delivery who have subscribed to the Sunday edition of The Kansas City Star newspaper.

Percentage of Collection	Collection Fee
1- 75%	........% of the sum collected, plus
76- 90%	........% of all sums collected over 76%, plus
91-100%	........% of all sums collected over 91%

13. The Star will pay Delivery Agent a fee of .... percent (........%) of all monies (excluding sales or use taxes) collected or received from customers other than regular subscribers to whom Delivery Agent makes delivery, if The Star designates Delivery Agent to make delivery to and/or collection from such other customers.

While The Star has, at least since 1904, retained the right to compete with carriers in the sale of newspapers,[9] and while The Star does, in fact, occasionally sell newspapers directly to home delivery subscribers,[10] the evidence before the Court indicates that this practice by The Star is so rare as to have but a *de minimis* impact on the distribution system. As the parties have stipulated, "[the] principal present method of distribution employed by defendant, provides in part that defendant sells its newspaper to all carriers, including the plaintiffs and all intervenors, who in turn resell those newspapers to subscribers or other customers."[11]

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9. The existing contract provides: "[F]irst party [the contract carrier] agrees to receive said newspapers and deliver them regularly and promptly each day to all subscribers at their respective residences or places of business along said Route. . . . Second party [defendant] reserves the right to sell newspapers to others anywhere along said Route." Exhibit K.

10. Stipulated Narrative Facts, ¶ 32 (October 19, 1977).

11. Stipulated Narrative Facts, ¶ 6 (October 19, 1977).

The existing contract further provides that the "first party [the contract carrier] shall not . . . sell or circulate any other newspaper, except by written consent of second party [the Star], during the existence of this contract."[12] However, the parties have stipulated that

> A number of carriers who have requested written permission from defendant in accordance with the terms of the carriers' contract within the last 10 years to deliver another specific newspaper not printed or published by defendant have been granted permission to do so. . .
>
> Defendant has not issued any order or directive preventing any carrier, including the plaintiff or any intervenor, from engaging in outside endeavors.[13]

The proposed contract, on the other hand, provides:

> Delivery Agent may engage in any employment or other business so long as it does not interfere or conflict with the prompt, regular and satisfactory performance by Delivery Agent of Delivery Agent's obligations under this contract.[14]

While the existing contract requires the carriers to keep a "route book"[15] "for the benefits of and satisfactory to" the Star and to furnish it to The Star at any time the Star so requests, the proposed contract goes further, stating:

> Delivery Agent agrees not to exhibit the subscriber and customer list or disclose any information contained

---

12. Exhibit K.

13. Stipulated Narrative Facts, ¶¶ 42, 44 (October 19, 1977).

14. Exhibit M.

15. The route book is to show "the name and address of every delivery on the . . . Route, amounts charged for regular subscriptions, when every subscriber has made payment and the date to which each subscription is paid . . . ." Exhibit M.

therein or relating to the identity or addresses of any regular subscriber to any person, entity or group other than the authorized representatives of The Star or the employees of Delivery Agent who require such information in order to deliver the newspapers or otherwise comply with this contract, and Delivery Agent agrees to instruct Delivery Agent's employees not to disclose such information.

To further detail the distinctions between the existing distribution system and the proposed system would not serve any useful purpose at the present time. With these facts and distinctions in mind, therefore an examination of the applicable law, as it applies to plaintiffs' request for a preliminary injunction, is in order.

III

GENERAL CONSIDERATIONS PERTINENT TO THE PRELIMINARY INJUNCTION ISSUE

The granting or denial of a preliminary injunction is a decision that is required to be exercised in conformity with well-settled and historic equitable considerations. See, 11 Wright & Miller, Federal Practice and Procedure: Civil Section 2947, pp. 423-24 (1973).

An excellent statement of those considerations is set out by the Eighth Circuit Court of Appeals in *Benson Hotel Corporation v. Woods*, 168 F.2d 694 at 696-97 as follows:

> The application for such an injunction does not involve a final determination on the merits; in fact, the purpose of an injunction pendente lite is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of in-

jury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time and thus to protect property or rights from further complication or injury until the issues can be determined after a full hearing. . . .

Such a temporary injunction should usually be granted where the questions presented are grave and injury to the moving party will result if it is denied and the final determination should be in his favor, while if it is granted and the decision is unfavorable the inconvenience and loss to the opposing party will be inconsiderable. Ordinarily, the court in its discretion may grant a preliminary injunction where it appears that there is a substantial controversy between the parties and that one of them is committing an act or threatening the immediate commission of an act that will cause irreparable injury or destroy the status quo of the controversy before a full hearing can be had on the merits of the case, and generally such an injunction will be granted whenever necessary to the orderly administration of justice.

Thus, the general purpose of a preliminary injunction is to preserve the status quo pending a final determination of the action on the merits after a full hearing.

[1] While the preliminary injunction has the force of a permanent injunction during its period of effectiveness, it is nonetheless interlocutory and is not a ruling on the ultimate merits of the case. As noted by the Eighth Circuit Court of Appeals in *Benson Hotel Corporation, supra,* at 697-98:

The decision of the trial court on granting the motion for preliminary injunction will not estop either of the parties on the trial of the case on its merits, nor would any determination of those questions by this court on appeal be binding on the trial court nor upon either of the parties in considering and determining the merits of the controversy. . . . There is sound reason for the rule that the decision of either the trial or appellate court in granting or denying the temporary injunction does not constitute the law of the case and will not estop the parties nor the court as to the merits of the case.

[2] On the trial on the merits of the case the issues must then be tried as though no temporary injunction had been applied for or issued.

A.

Criteria for the Issuance of a Preliminary Injunction

[3] Ordinarily, in order to justify the issuance of a preliminary injunction by the trial court, the movant has the burden of showing:

(1) Substantial probability of success at trial by the moving party, and (2) Irreparable injury to the moving party absent such issuance.

Other factors which may be considered in the decision to grant or to deny the request are the absence of substantial harm to other interested parties, and the absence of harm to the public interest. See, for instance, *Minnesota Bearing Company v. White Motor Corporation,* 470 F.2d 1323, 1326 (8th Cir. 1973). However, these considerations are not the sole basis for the granting or with-

holding of a preliminary injunction. As stated in the landmark case of *City of Newton v. Levis,* 79 F. 715, 718 (8th Cir. 1897):

> A preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted.

In *Pratt v. Stout,* 85 F.2d 172, 176-77 (8th Cir. 1936) these same basic considerations are stated thusly:

> If the questions presented by a suit for an injunction are grave and difficult and the injury to the moving party will be certain, substantial, and irreparable if the motion for a temporary injunction is denied and the final decision is favorable, while if the motion is granted and the decision is unfavorable the inconvenience and loss to the opposing party will be inconsiderable or he may be protected by a bond, the injunction usually should be granted. . . .
>
> When the nature of the questions which arise upon a suit make them a proper subject for deliberate examination, and if a stay of proceedings will not result in too great injury to the defendants, it is proper to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined.

And, as expressed in *Love v. Atchison, T. & S.F. Ry. Co.,* 185 F. 321, 331-32 (8th Cir. 1911), *cert. denied, West v. Atchison, T. & S.F. Ry. Co.,* 220 U.S. 618, 31 S.Ct. 721, 55 L.Ed. 612:

It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted.

The above stated considerations and test for the issuance of a temporary injunction received the approval of the Supreme Court in *Ohio Oil Company v. Conway,* 279 U.S. 813, 815, 49 S.Ct. 256, 73 L.Ed. 972, 973 (1929), have been variously expressed, and, recently, have been applied in such a manner as to minimize the importance of the movant's showing a likelihood of success on the merits. For example, in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.,* 526 F.2d 86, 88 (9th Cir. 1975), the Court stated:

> The district court denied the [preliminary] injunction sought in this case because of its "serious reservations as to the probability of success on the merits. . . ." . . .
>
> There is, however, an alternative test that the district court did not apply. As the Second Circuit stated in *Charlie's Girls, Inc. v. Revlon, Inc.,* 483 F.2d 953, 954 (2d Cir. 1973): "One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor."

The Fourth Circuit in a very recent application of these alternative tests stated:

> The district court below erred in holding that plaintiff must first show "likelihood of success" in order to be entitled to preliminary relief. Instead, the first step in a Rule 65(a) situation is for the court to balance the "likelihood" of irreparable harm to the plaintiff against the "likelihood" of harm to the defendant; and if a decided imbalance of hardship should appear in plaintiff's favor, then the likelihood-of-success test is displaced by Judge Jerome Frank's famous formulation:
>
> > [I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.
>
> *Hamilton Watch Co. v. Benrus Watch Co.*, [2 Cir.] *supra*, 206 F.2d [738] at 740, 743; *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970). The importance of probability of success increases as the probability of irreparable injury diminishes, . . . and where the latter may be characterized as simply "possible," the former can be decisive. Even so, it remains merely one "strong factor" to be weighed alongside both the likely harm to the defendant and the public interest.[16]

See also *Chicago, B. & Q. R. Co. v. Chicago Great Western R. Co.*, 190 F.2d 361, 363-64 (8th Cir. 1951); *Checker Motors Corporation v. Chrysler Corporation*, 405 F.2d 319, 323 (2d Cir. 1969) *cert. denied*, 394 U.S. 999, 89 S.Ct.

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16. *Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189, 195 (4th Cir. 1977).

1595, 22 L.Ed.2d 777; *Omega Importing Corp. v. Petri-Kine Camera Company,* 451 F.2d 1190, 1193-94 (2d Cir. 1971); *Costandi v. AAMCO Automatic Transmissions, Inc.,* 456 F.2d 941, 943 (9th Cir. 1972); *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953).

[4] Thus, the "likelihood of success" test is not the exclusive means for determining whether a preliminary injunction should issue; rather, a viable alternative test —the "balance of hardships" test—exists.[17] Because of the unique facts and issues which are before the Court, the latter test will be utilized in assessing the propriety of the issuance of a preliminary injunction in this cause.

B.

Irreparable Harm and the Public Interest

[5] While the value of a particular contract carrier's delivery route might be difficult to express in monetary terms, it is not an impossible task. See, *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971). That a delivery route's worth is susceptible of monetary valuation does not, however, preclude injunctive relief. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2948, pp. 439-40 (1973) states it thusly:

> Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable. Indeed, when the potential economic loss is so great as to threaten the existence of the moving party's business, then an injunction may be granted, *even though the amount of direct financial harm readily is ascertainable.* [Emphasis added.]

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17. See also, *Atchison, T. & S. F. R. Co. v. Board of Trade,* 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350, 371, n. 15 (1973).

Judge Friendly in *Semmes Motors, Inc. v. Ford Motor Company,* 429 F.2d 1197, 1205, (2d Cir. 1970), in applying this principle stated:

> Consideration of the propriety of the temporary injunction must begin by recognizing that here, in Judge Frank's much quoted phrase, "the balance of hardships tips decidedly toward plaintiff," *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2 Cir. 1953). Ford's contention that Semmes failed to show irreparable injury from termination is wholly unpersuasive. Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond. But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award. . . . Moreover, they want to continue living. As Judge Goodrich said, a "judgment for damages acquired years after his franchise has been taken away and his business obliterated is small consolation to one who, as here, has had a Ford franchise" for many years, *Bateman v. Ford Motor Co.,* 302 F.2d 63, 66 (3 Cir. 1962). As against this, the hardship to Ford in continuing the Semmes dealership *pendente lite* was relatively small.

And, as was stated in *Carlo C. Geraldi Corporation v. Miller Brewing Company,* 421 F.Supp. 233, 236 (D.N.J. 1976):

> "This Court finds that the loss of business and good will, and the threatened loss of the enterprise itself, constitute irreparable injury to the plaintiff

sufficient to justify the issuance of a preliminary injunction. See, e. g., *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969); *Brennan Petroleum Prods. Co. v. Pasco Petroleum Co.*, 373 F.Supp. 1312, 1316 (D.Ariz.1974); *N. W. Controls, Inc. v. Outboard Marine Corp.*, 317 F.Supp. 698, 703 (D.Del.1970); cf. D. Dobbs, Remedies § 12.18, at 884-5 (1973). Furthermore, the balance of hardships tips decidedly in favor of the plaintiff's position. The plaintiff would clearly suffer major losses without preliminary relief, since Miller products constitute approximately eighty per cent (80%) of the plaintiff's total sales volume. An injunction, on the other hand, would cause little, if any, harm to Miller. In fact, Miller could be said to benefit insofar as it derived profits from the continued sales to the plaintiff. Certainly the public would benefit from the uninterrupted availability of Miller products. Finally, we must also consider that failure to grant preliminary relief would result in economic hardship for the plaintiff's employees."

[6] The testimony at the hearing convinces this Court that irreparable harm would result to plaintiffs should a preliminary injunction not issue. Many plaintiffs paid thousands of dollars for their routes. Some borrowed money to finance the purchase and are still paying off their loans. Several testified that they employed others to assist them with the physical delivery of the papers. The Court heard testimony as to the manner in which the carrier established good will among subscribers, the methods by which he encouraged nonsubscribers to subscribe, and the amount of capital investment needed to operate a route. As will be developed

later, plaintiffs have raised serious and difficult questions by this suit. Therefore, to deprive these contract carriers of their business until a final decision is reached in this case would be unconscionable.[18] This conclusion is particularly compelling when one considers that The Star has been distributing its newspaper by contract carriers since approximately 1880. In short, noting the gravity and difficulty of the questions raised on the merits, to maintain the status quo pending a final determination on the merits in the near future (that is, to cause defendant to continue its practice of 97 years for several more months) is, when one considers the irreparable damage which would otherwise be done to plaintiffs' businesses, the only result which equity and good conscience will allow this Court to reach.

This result is further reinforced by a consideration of the public interest. As stated in *Virginia R. Co. v. System Federation,* 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789, 802 (1937):

> Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

In 7 Moore's Federal Practice, ¶ 65.04[1], p. 65-45 (1975) it states:

> The public interest is also a factor to be considered. When an injunction is sought and the grant would aid the public interest the latter factor is highly relevant.

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18. There was testimony that, because of certain features of the contract carrier's business, to interrupt his business, even briefly, would do substantial damage. This evidence was not refuted.

[7] Consideration of the public interest is particularly appropriate in the context of a private antitrust suit where injunctive relief is sought. In *Zenith Radio Corporation v. Hazeltine Research,* 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129, 152 (1969) it is declared:

> [T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.

If it should appear in the trial on the merits, that defendant has transgressed the federal antitrust laws, to term plaintiffs' injuries compensable in money and deny injunctive relief, thereby allowing continuation of violation of the antitrust laws would be highly inappropriate. While satisfying the pocketbook interests of the individual plaintiffs, it would do little to protect the public. This legal principle is stated in *Foremost International Tours, Inc. v. Qantas Airways, Ltd.,* 379 F.Supp. 88, 97 (D.Hawaii 1974), aff'd, 525 F.2d 281 (9th Cir. 1975):

> The danger that Foremost will suffer irreparable injury before the CAB has investigated the charges of deceptive practices and unfair methods of competition is very real. Foremost has established that the existence of its business life as a competitor in the free-wheeling tour market is threatened. This is a sufficient showing of irreparable injury to warrant a preliminary injunction even though the amount of direct financial harm might be ascertainable. *Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205 (2d Cir. 1970) (per Friendly, J.); 11 C. Wright & A. Miller § 2948 at 440 (1973). *Courts should be particularly concerned with threats to the existence*

of a moving party's business in the area of antitrust. An award of only money damages in lieu of preserving a competitor disserves the public interest. (Emphasis added.)

The conclusion is inescapable that plaintiffs would suffer sufficient irreparable harm from the termination of their contracts with The Star that, if the issues in this cause are found to be "grave, serious, and difficult," a preliminary injunction should issue.

C.

An Assessment of the Gravity, Seriousness, and Difficulty of the Questions Presented.

[8, 9] In 1890, Congress passed Section 2 of the Sherman Act. Presently codified as 15 U.S.C. § 2, it has remained substantively intact with but minor amendments, not relevant here, in 1955 and 1974. It presently reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As plain and forthright as the language of this section appears, there are but two things which may be confidently said about it: First, mere possession of monopoly

power[19] does not constitute the offense of monopolization; something more is needed.[20] *United States v. Grinnell Corporation,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed. 778 (1966); *National Wrestling Alliance v. Myers,* 325 F.2d 768 (8th Cir. 1963); *Kansas City Star Co. v. United States,* 240 F.2d 643 (8th Cir. 1957), *cert. denied,* 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438 (1957); *Pacific Engineering & Production Company of Nevada v. Kerr-McGee Corporation,* 551 F.2d 790-791 (10th Cir. 1977). Second, concerted action is unnecessary to constitute the offense of monopolization; unilateral monopolization violates the Sherman Act. *Continental Ore Co. v. Union Carbide & Carbon Corporation,* 370 U.S. 690, 709, 82 S.Ct. 1404, 8 L.Ed.2d 777, 790 (1962). It is at this point that a Court's confidence in applying Section 2 of the Sherman Act to the facts before it must end, for it is at this point that the question which has plagued the legal, judicial, and academic communities must be faced: What conduct must a defendant, who possesses monopoly power, engage in before he is to be found guilty of transgressing the dictates of Sherman § 2?

It might be argued that "[s]ize and power are themselves facts some of whose consequences do not depend

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19. Monopoly power is defined as "the power to control prices or exclude competition." *United States v. Grinnell Corporation,* 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778, 786 (1966); *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264, 1278 (1956).

20. In *United States v. United States Steel Corporation,* 251 U.S. 417, 451, 40 S.Ct. 293, 299, 64 L.Ed. 343, (1920), the Court stated: "[T]he law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible." *But see United States v. Swift & Co.,* 286 U.S. 106, 116, 52 S.Ct. 460, 463, 76 L.Ed. 999, 1006 (1932) where the Court stated: "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . ."

upon the way in which they were created or in which they are used,"[21] "that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone,"[22] and that therefore, very little conduct should be required before an entity possessing monopoly power is found guilty of monopolization. On the other hand, there is an attractive argument to be made that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[23] The tension and problems occasioned by these competing policy considerations have resulted in a series of efforts, by numerous judges and scholars, to formulate a fair expression of the test used to determine at what point an entity, which possesses monopoly power, has engaged in sufficient conduct to violate Sherman § 2.

Early in this Century, many, relying upon *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911) and *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911), believed Sherman § 2 to be violated only by an entity possessing monopoly power and engaging in conduct which was independently violative of Sherman

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21. *United States v. American Can Co.*, 230 F. 859, 901 (D.Md.1916), *appeal dismissed*, 256 U.S. 706, 41 S.Ct. 624, 65 L.Ed. 1181 (1921).

22. *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), quoted with express approval in *American Tobacco Co. v. United States*, 328 U.S. 781, 813, 66 S.Ct. 1125, 1140, 90 L.Ed. 1575, 1596 (1946).

23. *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

§ 1.[24] While it is certainly true that "[a]n enterprise has monopolized in violation of § 2 of the Sherman Act if it has acquired or maintained a power to exclude others as a result of using an unreasonable 'restraint of trade' in violation of § 1 of the Sherman Act," *United States v. United Shoe Machinery Corporation,* 110 F.Supp. 295, 342 (D.Mass.1953), aff'd per curiam, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954), it is doubtful that, even in 1911, § 2 prohibited *only* monopoly obtained by unlawful restraints and predatory practices, for such a rule would render § 2 wholly superfluous. In 1 Toulmin's Anti-Trust Laws § 15.5, p. 293 (1949), it is observed:

> [I]f a monopoly, accomplished by any means other than by contracts or combinations or conspiracies in restraint of trade, be not prohibited by the second section then that section performs no office whatever in the Sherman Law.

In stark contrast to the conception given § 2 in the early years of this Century is the opinion by Judge Learned Hand in *United States v. Aluminum Company of America,* 148 F.2d 416 (2d Cir. 1945). At certain points in the opinion, Judge Hand seems to say that monopolization

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24. As Judge Wyzanski observed in *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295, 341 (D.Mass.1953), the 1911 Standard Oil and American Tobacco "opinions encouraged the view that there was no monopolization unless defendant had resorted to predatory practices."

Section 1 of the Sherman Act, 15 U.S.C. § 1, now provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared by section 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the courts."

occurs whenever an entity possessing monopoly power engages in any volitional business act. He reasons:

> Starting . . . with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.[25]

As Judge Wyzanski determined from his reading of the *Alcoa* opinion, "Judge Hand said that one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business, . . . apparently even if there is no showing that his business involves any exclusionary practice." *United Shoe Machinery Corporation, supra,* at 342. However, as Judge Wyzanski goes on to explain,

> this doctrine is softened by Judge Hand's suggestion that the defendant may escape statutory liability if

25. This excerpt from the *Alcoa* opinion was quoted with express approval by the Supreme Court in *American Tobacco Co. v. United States,* 328 U.S. 781, 813, 66 S.Ct. 1125, 1141, 90 L.Ed. 1575, 1596 (1946).

> it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages, (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority).

United Shoe Machinery Corporation, supra, at 342. Despite this "softening," however, the *Alcoa* opinion contains a great deal of language that would indicate that, unless a monopoly's "continued and undisturbed control" of a market "fell undesigned into [its] lap," unless the monopoly does "not seek, but cannot avoid, the control of the market," unless a monopoly's continued control of the relevant market has "been thrust upon it," unless it were "the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces," it is guilty of monopolization. *United States v. Aluminum Company of America,* 148 F.2d 416, 428, 429, 430 (2d Cir. 1945). Judge Hand continues, at 431:

> It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingots and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience,

> trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.[26]

As indicated in the footnotes, the Supreme Court, in *American Tobacco Co. v. United States,* 328 U.S. 781, 813, 66 S.Ct. 1125, 90 L.Ed. 1575, 1596 (1946) "welcome[d] the opportunity to endorse" the *Alcoa* opinion in the particulars set forth above.

So broad was the sweep of the *Alcoa* opinion that many thought it inevitable that entities possessing monopoly power would face a rebuttable presumption that it was guilty of monopolization. Judge Wyzanski, in another of his examinations of Sherman § 2, stated in *United States v. Grinnell Corporation,* 236 F.Supp. 244, 248 (D. R.I.1964), aff'd except as to decree, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966);

> [I]n the two decades since [Alcoa], most of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom, there was a rebuttable presumption that such power had been criminally acquired and was a monopolizing punishable under § 2. To be sure, the putative offender would be allowed to avoid or defeat this presumption if

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26. That portion of this excerpt from the *Alcoa* opinion beginning with "It insists . . ." was quoted with express approval by the Supreme Court in *American Tobacco Co. v. United States,* 328 U.S. 781, 813, 66 S.Ct. 1125, 90 L.Ed. 1575, 1596 (1946).

> he bore the burden of proving that this share of the market was the result of superior skill, superior products, natural advantages, technological or economic efficiency, scientific research, low margins of profit maintained permanently and without discrimination, legal licenses, or the like.

The Supreme Court, however, declined to pass upon this question, commenting at footnote 7 of its opinion:

> Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like.

While refusing to pass upon the "rebuttable presumption" question raised below, the Court did, however, succinctly set forth a test for determining whether a party has monopolized in violation of Sherman § 2. At 570-71, 86 S.Ct. at 1704, 16 L.Ed.2d at 786, the Court stated:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

While one who possesses monopoly power clearly need not go so far as to engage in unlawful restraints, predatory practices, or conduct otherwise morally culpable or shocking before it transgresses Sherman § 2, it is unrealistic to conclude that Sherman § 2 requires all who possess monopoly power to cut their engines and drift aimlessly with the ebb and flow of natural market forces. The true restraint imposed by § 2 lies somewhere between

these two extremes. While the test enunciated by the Supreme Court in *Grinnell* is a good and functional test for identifying those guilty of monopolization, it does not, by any means, end the uncertainties which pervade this area of the law. Nor does it easily resolve the application of the test to varying factual situations.

[10] The difficulty in gaining a thorough understanding and appreciation for what the abstract law is with regard to the conduct element of the monopolization offense is surpassed by the difficulty in applying that law to the particular facts of this case. The Court initially is confronted with the proposition, beyond serious dispute, that, as a general rule, a newspaper publisher, for valid business reasons, may legally alter its distribution system from one which utilizes the independent contractor as an intermediary to one based on direct sales. As one court summarized the law:

> Courts have uniformly refused to enjoin newspaper publishers from changing, for valid business reasons, their systems of distribution from that of independent distributors to direct sales. *Naify v. McClatchy Newspapers,* [1977] Trade Reg.Rep. (CCH ¶ 61,383 (N.D. Cal. April 21, 1977); *Knutson v. Daily Review, Inc., supra; McGuire v. Times Mirror Co.,* 405 F.Supp. 57 (C.D.Cal.1975); *Lamarca v. Miami Herald Publishing Co.,* 395 F.Supp. 324 (S.D.Fla.1975), aff'd, 524 F.2d 1230 (5th Cir. 1975) (without published opinion).

This is but a particularizing of the general authority of any manufacturer to distribute all of his own products himself rather than to use independent contractors for such distribution.

This Court, however, is not confronted with so simple a situation; rather, it is complicated by the fact that in this case, The Star concededly possesses monopoly power

at the publication level. As such, questions which were irrelevant to a determination of the vast majority of the cases cited to the Court by The Star must be confronted here. They include, among others; (1) Does The Star in view of its admitted monopoly as publisher of its newspaper have the absolute right to change its method of distribution of its newspapers from the use of independent contract carriers to distribution by agents employed by The Star for that limited purpose?[27] (2) Will the change in method of distribution as proposed by The Star make it appreciably more difficult for other potential newspaper publishers to enter into the newspaper publishing market as a competitor to The Star?[28] (3) Would a potential newspaper publisher wishing to enter into this area as a competitor of The Star need and use the independent contractor delivery system presently distributing for the Star?[29] (4) Are internal distribution costs a substantial barrier to others to entry into the newspaper business as a competitor of The Star?[30] (5) Could the need of a potential publishing competitor be met by independent entrepreneurs not currently in the newspaper trade?

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27. See and compare, *Naify v. McClatchy Newspapers,* [1977] Trade Reg.Rep. (CCH ¶ 61,383 (N.D.Cal. April 21, 1977); *Knutson v. Daily Review, Inc., supra; McGuire v. Times Mirror Co.,* 405 F.Supp. 57 (C.D.Cal.1975); *Lamarca v. Miami Herald Publishing Co.,* 395 F.Supp. 324 (S.D.Fla.1975), aff'd, 524 F.2d 1230 (5th Cir. 1975) (without published opinion). See, also, Footnote 2.

28. Somewhat relevant at this point is the Supreme Court's caveat that "a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition." *Lorain Journal Co. v. United States,* 342 U.S. 143, 154, 72 S.Ct. 181, 187, 96 L.Ed. 162, 172 (1951). In that case the newspaper was endeavoring to monopolize advertising.

29. See test stated in *Knutson v. Daily Review, Inc.,* 548 F.2d 795, 803, 804 (9 Cir 1976).

30. See Footnote 2.

Permeating many of these questions is what is the legal effect, if any, of The Star's history leading to its current monopoly as newspaper publisher in the Greater Kansas City area.

IV

CONCLUSION

[11] Because of the seriousness and difficulty of the issues remaining to be litigated and in light of the irreparable harm which plaintiffs would suffer were the status quo not maintained, equity and good conscience mandate the issuance of a preliminary injunction.[31] Therefore, it is hereby

ORDERED that defendant be, and hereby is, enjoined, until further order of this Court, from terminating its existing contracts with plaintiffs; it is further

ORDERED that this cause be, and it is hereby, set for pretrial conference at 2:00 p.m., Thursday, October 27, 1977, Judge Hunter's Chambers, Room 613, United States Courthouse, 811 Grand Avenue, Kansas City, Missouri; it is further

ORDERED that this cause be, and it is hereby set for full trial on the merits to commence at 9:30 a. m., Monday, January 16, 1978, Judge Hunter's Courtroom, Sixth Floor, United States Courthouse, 811 Grand Avenue, Kansas City, Missouri.

/s/ Elmo B. Hunter
District Judge

(Appendices Omitted)

31. In view of the result reached it is unnecessary to consider the contract issues that are separate from the monopoly issues.

STAY OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

81-1963/82-1390
September Term, 1983

GWELDON LEE PASCHALL AND ALL INTERVENORS,
Appellees,

vs.

THE KANSAS CITY STAR COMPANY,
Appellant.

Appeals from the United States District Court for the
Western District of Missouri

On motion of appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed to and including June 19, 1984. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 21, 1984

JURISDICTION OF THIS COURT

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

15 U.S.C. § 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATUTES INVOLVED

15 U.S.C. § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

15 U.S.C. § 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

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